THE COURT-ANNEXED ARBITRATION ACT OF 1978

HEARING

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 2253

TO AMEND TITLE 28 OF THE UNITED STATES CODE TO ENCOURAGE PROMPT, INFORMAL, AND INEXPENSIVE RESOLUTION OF CIVIL CASES BY USE OF ARBITRATION IN THE UNITED STATES DISTRICT COURTS

APRIL 14, 1978

Printed for the use of the Committee on the Judiciary

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THE COURT-ANNEXED ARBITRATION ACT OF 1978

FRIDAY, APRIL 14, 1978

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:10 a.m., in room 2228, Dirksen Senate Office Building, Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Staff present: Robert E. Feidler, counsel; Michael J. Altier, deputy counsel; Kathryn M. Coulter, chief clerk; Pamela Phillips, assistant chief clerk; Rosalie Cameron, professional staff member; and Karen Kennedy, professional staff member.

Senator DECONCINI. Good morning. The Subcommittee on Improvements in Judicial Machinery will come to order.

Today we will hold the first of three hearings on S. 2253, a legislative proposal which would establish a compulsory, nonbinding arbitration program for the district courts. Under the proposal, specified categories of civil actions would be referred to arbitration with the right to a full district court trial de novo preserved.

Compulsory, nonbinding arbitration, similar to that proposed under the bill, has been in use in several States. Ohio, Pennsylvania, New York, and California, are examples which have had positive results with compulsory nonbinding arbitration for relatively small claims. However, it is recognized that in adopting a Federal arbitration plan, Congress must proceed cautiously and address itself to the unique concerns of the Federal courts.

The bill sets forth procedures for compulsory, nonbinding arbitration. Under the proposal, five to eight districts shall be chosen by the Chief Justice to try compulsory, nonbinding arbitration on an experimental basis. Any district may also adopt this arbitration procedures on its own. This combination of voluntary use and the control group of five to eight districts is warranted in order to evaluate the advantages and disadvantages of its use in the Federal court system.

Under the bill, all cases of specified types filed with each district court adopting the scheme would be referred to arbitration soon after the pleadings are closed. In addition, any matter to which the parties consent to arbitrate would also be referred to arbitration. Cases will be referred to arbitration as soon as possible after the

twentieth day following the close of pleadings, except when motions for summary relief are made or discovery is initiated during the 20-day period. Referral to arbitration must be made within 120 days after the closing of the pleadings.

Upon arbitration referral, the parties have 7 days to select an arbitrator, or panel of arbitrators. If they do not, a panel of three arbitrators will be selected from a list maintained by the district court. Those on the list would be members of the bar of the court for at least 5 years. Further, they are to be certified for a 4-year term.

An arbitration hearing in a case would begin within 30 days after the action was referred to arbitration. With the Federal Rules of Evidence as a nonbinding guide, a hearing is held and witnesses and documents would be subpoenaed. Privileged material cannot be introduced during an arbitration procedure. The relaxing of the Rules of Evidence would permit the admission of some hearsay evidence, particularly in the form of documents.

An arbitration award would be a judgment of the court unless a party were to demand a trial de novo within 20 days. In this situation, the case would be placed on the district court's civil docket and treated as if it were never referred to arbitration. A disincentive to demanding a trial de novo is involved in this legislation. Unless a party who demanded a trial de novo obtained a more favorable judgment than the arbitration award, he would be assessed the costs of the arbitration proceeding.

Today's witnesses include the Attorney General of the United States, Judge Griffin B. Bell, Mr. Robert Coulson, President of the American Arbitration Association. Their testimony will be followed by two representatives from Philadelphia: Judge James R. Cavanaugh of the Court of Common Pleas of Philadelphia, and Mr. Lewis Jay Gordon of the Philadelphia Bar Association will speak on the experience of the compulsory nonbinding arbitration program currently in operation in the State court system, with an emphasis on its operation in Philadelphia County.

This morning's hearing will conclude with testimony from Mr. Craig Spangenberg of the Association of Trial Lawyers of America and Mr. Charles Tatelbaum of the Commercial Law League of America.

I welcome you, gentlemen. I appreciate your being here today. I thank you for your time and effort on behalf of this legislation.

Our first witness will be General Bell.

Before calling our first witness. I would ask that the bill be included in the record. [Material follows:]

95TH CONGRESS
1ST SESSION

S. 2253

IN THE SENATE OF THE UNITED STATES

OCTOBER 28 (legislative day, OCTOBER 21), 1977

Mr. EASTLAND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to encourage prompt, informal, and inexpensive resolution of civil cases by use of arbitration in United States district courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds and declares that—

(a) in many Federal judicial districts, parties to civil litigation experience lengthy delays and avoidable expense in the adjudication of their litigation; and

(b) arbitration has proven to be an effective and fair means of adjudicating many kinds of civil disputes.

SEC. 2. It is the purpose of this legislation to promote the

prompt, informal, and inexpensive resolution of civil disputes by encouraging greater use of arbitration on a voluntary basis and by authorizing, under the conditions specified in this Act, the courts to refer certain cases to arbitration in certain districts.

SEC. 3. (a) Title 28 of the United States Code is amended by adding after chapter 43 the following new chapter:

"Chapter 44.—ARBITRATION

"§ 641. Authorization of arbitration

"A United States district court may authorize by local rule the use of arbitration in accordance with the provisions of this chapter.

"§ 642. Certification of arbitrators

"(a) The chief judge of a United States district court in which the use of arbitration pursuant to this chapter is authorized shall certify as many arbitrators to serve within the judicial district as he determines to be necessary under this chapter.

"(b) An individual may be certified to serve as an arbitrator under this chapter if—

"(1) he has been for at least five years a member of the bar of the highest court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or the Canal Zone, and is admitted to practice before the certifying court; and

"(2) he is determined by the certifying court to be competent to perform the duties of an arbitrator.

"(c) An arbitrator may hold no full-time civil or military office or employment under the United States. An arbitrator is a special Government employee within the meaning of section 202 of title 18 and shall not be barred from the practice of law by operation of a code of ethics except as he is restricted from doing so as such a special Government employee and except that no arbitrator or partner or associate of an arbitrator may act as agent or attorney for any party in a matter in which the arbitrator participated as arbitrator.

"(d) Each individual certified as an arbitrator under this section shall take the oath or affirmation prescribed by section 453 before serving as an arbitrator.

"(e) Each certification shall be entered on record in the court and notice of the certification shall be given at once by the clerk of that court to the Director.

"(f) Certification of an arbitrator shall be for a period of four years unless sooner withdrawn by order of a majority of the active judges of the court.

"§ 643. Compensation and expenses of arbitrators

"(a) Arbitrators shall receive as full compensation for their services a fee determined by the district court not to exceed $50 for each case in which they serve. The fee shall be paid by or pursuant to the order of the Director.

"(b) Under regulations prescribed by the Director and approved by the Judicial Conference, the Director shall reimburse arbitrators for actual expenses necessarily incurred by them in the performance of their duties under this chapter. Reimbursement may be made, at rates not exceeding those prescribed by the regulations, for expenses incurred by arbitrators for clerical and secretarial assistance, stationery, telephone and other communications services, travel, and such other expenses as may be determined to be necessary for the proper performance of the duties of such arbitrators, except that no reimbursement shall be made for all or any portion of the expense incurred by arbitrators for the procurement of office space.

"§ 644. Jurisdiction and powers of arbitrators

"(a) Notwithstanding any provision of law to the contrary, if the court authorizes arbitration under section 641,

the court shall refer to arbitration any civil action pending before it if—

"(1) the United States is a party, and—

"(A) the action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

"(B) the action is brought pursuant to section 2 of the Act of August 24, 1935, as amended (40 U.S.C. 270b), the United States has no monetary interest in the claim, and the relief sought—

"(i) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

"(ii) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any nonmonetary claims are insubstantial; or

"(2) the United States is not a party, and—

"(A) the parties consent to arbitration and the relief sought consists only of money damages; or

"(B) (i) the relief sought—

"(a) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

"(b) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any nonmonetary claims are insubstantial; and

"(ii) jurisdiction is based in whole or in part on—

"(a) section 1331 of this title and the action is brought pursuant to section 20 of the Act of March 4, 1915, as amended (46 U.S.C. 688);

"(b) section 1331 or 1332 of this title and the action is based on a negotiable instrument or a contract; or

"(c) section 1332 or 1333 of this title and the action is for personal injury or property damage.

"(b) Arbitrators to whom actions are referred pursuant to this chapter shall have within the territorial jurisdiction of the court the power to conduct arbitration hearings and make awards as provided in this chapter and in such rules consistent with the provisions of this chapter as may be promulgated by the court for the conduct of arbitration proceedings.

"§ 645. Referral to arbitration

"(a) (1) Actions subject to arbitration pursuant to this chapter, other than those described in section 644(a) (1) (B) (ii) or 644(a) (2) (B) (i) (b), shall be held by the clerk of the court for twenty days after the filing of the answer. If, by the expiration of that time, a party has filed a motion for judgment on the pleadings, summary judgment, or similar relief, the clerk shall refer the action to arbitration only after the court has ruled on the motion. If, by the expiration of that time, a party has initiated discovery proceedings, the clerk shall refer the action to arbitration upon notification to the clerk that discovery has been completed or upon the expiration of one hundred and twenty days from the filing of the answer, whichever occurs earlier. If, by the expiration of that time, no party has filed a motion for judgment on the pleadings, summary judgment, or similar relief, the clerk promptly shall refer the action to arbitration, and in no event more than one hundred and twenty days after the filing of the answer.

"(2) The court may return an action described in section 644(a) (1) (B) (ii) or 644(a) (2) (B) (1) (b) for arbitration if at any time before the commencement of trial the court determines that the nonmonetary claims in the case are insubstantial and returns the case to the clerk with

a statement of such determination. The clerk promptly shall refer any such case to arbitration and in no event more than one hundred and twenty days after such determination.

"(b) The arbitration shall be conducted before a panel of three arbitrators, unless the parties agree to have it conducted before a single arbitrator. The parties may by agreement select any person or persons to conduct the arbitration. If, within seven days after the action has been referred to arbitration, the parties have not notified the clerk of the court that they have made such a selection, the arbitrator or arbitrators shall be chosen by the clerk by a process of random selection from among the persons certified by the court.

"(c) A person selected to be an arbitrator shall be disqualified for bias or prejudice as provided in section 144 and shall disqualify himself in any action in which he would be required under section 455 to disqualify himself if he were a justice, judge, magistrate, or referee in bankruptcy.

"§ 646. Arbitration hearing

"(a) The arbitration hearing shall commence not later than thirty days after the action is referred to arbitration and shall be concluded promptly.

"(b) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing

under this chapter. The arbitrators shall have the power to administer oaths and affirmations.

"(c) The Federal Rules of Evidence may be used as guides to the admissibility of evidence in an arbitration hearing. Notwithstanding the provisions of the Federal Rules of Evidence, relevant evidence that is not privileged may be admitted in an arbitration hearing.

"(d) A party may have a recording and transcript made of the arbitration hearing at his expense. If a party has a transcript or a tape recording made, he shall furnish a copy of the transcript or tape recording without charge to any other party.

"§ 647. Arbitration award and judgment

"The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial de novo pursuant to section 648 has expired, unless a party demands a trial de novo before the court pursuant to that section. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect, as a judgment of the court in a civil action, except that it shall not be subject to appeal.

"§ 648. Trial de novo

"(a) Within twenty days after the filing of the arbitra-

tion award with the court, any party may demand a trial de novo in the district court.

"(b) Upon a demand for a trial de novo, the action shall be placed in the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

"(c) At the trial de novo the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial de novo.

"(d) If the party who demanded a trial de novo fails to obtain a judgment in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the costs of the arbitration proceeding, including the amount of the arbitration fees, and—

"(1) if he is a plaintiff and the arbitration award were in his favor, he shall pay to the court an amount equivalent to interest on the arbitration award from the time it was filed; or

"(2) if he is a defendant, he shall pay to the plaintiff interest on the arbitration award from the time it was filed.

"§ 649. Definitions

"As used in this chapter—

"(a) 'Judicial Conference' means the Judicial Conference of the United States;

"(b) 'district court' means a district court created under chapter 5 of this title and the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands;

"(c) 'Director' means the Director of the Administrative Office of the United States Courts;

"(d) 'arbitrator' means an arbitrator certified pursuant to section 642 to conduct arbitration pursuant to this chapter; and

"(e) the United States is a party to a civil action if it is a party directly, or through its agency or department, or through its officer or employee in his official capacity.".

(b) The analysis at the beginning of part III of title 28, United States Code, is amended by adding after the item relating to chapter 43 the following new item:

"44. Arbitration.".

(c) The analysis at the beginning of title 28, United States Code, is amended by adding after the item relating to chapter 43 the following new item:

"44. Arbitration ..... 651".

SEC. 4. Section 202 (a) of title 18, United States Code, is amended by deleting the words "a part-time United States Commissioner" and inserting in lieu thereof the words "an arbitrator certified pursuant to section 642 of title 28".

SEC. 5. Arbitration in accordance with the provisions of chapter 44 of title 28, United States Code, shall be implemented on a test basis pursuant to this section for three years in no fewer than five nor more than eight representative districts to be designated by the Chief Justice of the United States, after consultation with the Attorney General. The selection of test districts shall be made on the basis of considerations such as the number of civil and criminal cases filed and tried annually in the district, the case backlog in the district, the number of civil cases that would be referred to arbitration that are filed and tried annually in the district, the number of district court judges and magistrates sitting in the district, and the geographical location of the district.

SEC. 6. The Judicial Conference of the United States is authorized to develop model procedures consistent with the provisions of this Act for the conduct of arbitration proceedings under this Act.

SEC. 7. (a) The Federal Judicial Center shall advise and consult with the Judicial Conference of the United

States and the district courts in connection with their duties under this Act.

(b) The Federal Judicial Center, in consultation with the Attorney General and the Administrative Office of the United States Courts, shall transmit to the Congress, on or before the expiration of the third year following the effective date of this Act, a report on the use, effectiveness, and benefits of arbitration in the test district courts and such other districts in which cases are referred to arbitration under this Act.

SEC. 8. (a) The Attorney General shall promulgate regulations to describe the cases subject to arbitration pursuant to section 644(a)(1)(A) of title 28, United States Code, within one hundred and twenty days of the date of enactment of this Act.

(b) This Act shall take effect one hundred and twenty days after the date of enactment, except that subsection (a) shall take effect on the date of enactment.

SEC. 9. There is authorized to be appropriated for the fiscal year ending September 30, 1979, to the judicial branch of the Government such sums as may be necessary to be allocated by the Administrative Office of the United States Courts to Federal judicial districts and the Federal Judicial Center to carry out the purposes of this Act. The funds so appropriated shall remain available until expended.

General Bell, I want to thank you for your time once again. I realize how busy you are and also I want to compliment Mr. Meador and the people in his office and division for the outstanding support, and assistance, and cooperation we have received from that Department.

STATEMENT OF GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE; AND JOHN M. BEAL, ATTORNEY, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

General Bell. I have with me Professor Meador and John Beal, who is Professor Meador's assistant.

I would like to submit my written testimony.

Senator DeConcini. It will appear in the record at this point in its entirety.

[Material follows:]

Statement of Griffin B. Bell, Attorney General

It is a pleasure to appear before the Subcommittee on Improvements in Judicial Machinery to urge careful and prompt consideration of S. 2253. This bill provides for an experiment in certain federal district courts with mandatory but non-binding arbitration of selected cases.

This proposal for court-annexed arbitration is a key element in the program of the Department of Justice to assure access to effective justice for all citizens and to improve the operations of our judicial system. In that effort over the past year we have worked very closely with this Subcommittee. We have been grateful for the counsel and cooperation you and your staff have provided us. As a result of our joint efforts, including the work of the Kastenmeier Subcommittee in the House, a number of measures are moving forward which will have a salutary impact on the administration of justice in the federal courts.

We have reached the point in our judicial system where simply adding more judges will not necessarily enable us to insure adequate access to effective justice for the variety and volume of disputes with which the federal courts are faced.

It is difficult to state with certainty what the cumulative effect would be of various court reform measures now pending in the Congress. We do not know whether or in what form they will be enacted. Each measure is directed at a particular part of the judicial process, and each would produce its own particular benefits.

Expanding the role of magistrates will relieve district court judges of tasks that do not require their attention. Diversity jurisdiction reform will clear the way for more federal judicial time to be given to federal law questions. The measure now before you to experiment with court annexed arbitration for some types of disputes is complementary to these other measures.

The consequence of clogged federal courts and mounting backlogs is not only an overworked federal judiciary but also litigants frustrated with unconscionable delay and great expense in their efforts to obtain the resolution of their legal disputes. This bill seeks to broaden access for the American people to their justice system and to provide mechanisms that will permit the expeditious resolution of disputes at a reasonable cost.

A large measure of actions filed in federal district courts are resolved by settlement before any trial. However, many settlements take place only after substantial preparation expenses have been incurred, often including voluminous discovery. In addition, some of the trials that are held could be avoided by having a neutral third party consider the evidence and provide an informed

decision on the merits, with some inducement to the litigants to accept that decision as the judgment in the case.

This proposal for court-annexed arbitration has been designed with these twin goals in mind: (1) speeding up the resolution of cases that are now settled and (2) resolving more quickly and less expensively many of the cases that now go to trial.

THE SUCCESSFUL STATE EXPERIENCES

Compulsory non-binding arbitration of civil court cases has been utilized by several states with good results. In Pennsylvania, a court-annexed arbitration system has been in effect for over 25 years. New York and Ohio have utilized arbitration since 1970; Michigan and Arizona, since 1971. California adopted a statute providing for compulsory nonbinding arbitration that became effective in 1976, after a successful program of voluntary arbitration. In addition, arbitration procedures for particular kinds of cases, such as medical malpractice and uninsured motorist insurance disputes, have been utilized in several states.

Thus the use of arbitration at the state level is gradually expanding. In Pennsylvania, the original jurisdictional ceiling was $1000. It was raised to $2000, then $3000, and, in 1971, after considerable study, to $10,000. Moreover, I am aware of no state that has chosen to discontinue arbitration after trying it out.

The State systems generally involve referral of money damage cases to volunteer lawyer arbitrators. The maximum value of claims that may be referred varies from $3,000 to $10,000.

The arbitrators are paid fees ranging from $30 in Ohio to $150 in California per case. They hear the evidence under relaxed rules of admissibility and render an award. There is generally a trial de novo available in the trial court, but with financial disincentives placed upon such a demand. Some States impose their disincentives on any party requesting a trial de novo, others only if the party does not improve its position at the trial de novo. The State plans have generally fared well against court challenges, beginning with the decision upholding the constitutionality of the first program in Pennsylvania. *Smith*, 381 Pa. 223, 112 A.2d 625, appeal dismissed sub nom. *Application of Smith* v. *Wissler*, 350 U.S. 858 (1955).

Appeal rates for trials de novo have ranged from 5 to no more than 15 percent of all cases arbitrated. This means that from 85 to 95% of cases referred to arbitration terminate there. Because of the difference in magnitude between the State cases and the cases encompassed in our arbitration proposal, we recognize that direct comparisons are difficult to make. However, the success that the State systems have had clearly indicates that this experiment is one worth trying in the federal courts. We have examined the particular procedures of the different State programs to determine what procedures would work best in the Federal system.

My own interest in the use of arbitration was heightened by my service as chairman of the Pound Conference Follow-up Task Force. In May of 1976, a distinguished group of lawyers, judges, and academicians gathered together in Minneapolis under the auspices of the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association. The conference marked the 50th anniversary of Roscoe Pound's seminal address entitled "The Cause of Popular Dissatisfaction with the Administration of Justice." At the conclusion of the conference, the Task Force was appointed to formulate recommendations based on the deliberations of and the material presented at the Conference. One of the main recommendations of the Task Force report was that arbitration procedures should be tried in the Federal courts. Consequently, when I became Attorney General, I directed the Office for Improvements in the Administration of Justice to develop legislation that would put this idea into effect.

THE PROPOSED STATUTORY PLAN

S. 2253 would authorize an experiment with court annexed arbitration for specified categories of cases in five to eight district courts for a three-year period. The legislation would also authorize any additional district court in the country to adopt the statutory experiment at the option of the judges. The Federal Judicial Center would evaluate the program and report to the Congress.

The bill sets forth specific categories of cases which would automatically be referred to arbitration before trial. These cases were identified on the basis of

three criteria. The first criterion is that the cases involve claims for money damages only. In such cases, often the only dispute is over the amount of money owed by one party to the other. In contrast, pleas for equitable relief would probably mean increased complexity and could require the continuing supervision of the court. Such cases would be inappropriate for arbitration.

The second criterion is that cases referred to arbitration be limited to those in which the claim does not exceed $50,000. In cases with claims in the hundreds of thousands or millions of dollars, the cost of a subsequent trial and of any disincentives for demanding such a trial are very small, relative to the claim itself. It is our belief, based upon the experience in the states that, where larger amounts are involved in the suit, the likelihood of one litigant or another requesting a trial de novo is greatly increased. In addition, cases involving hundreds of thousands of dollars or more could very well be of such complexity that they would require an arbitration proceeding of greater length than the speedy proceedings intended to be produced by the bill. As a result, suits over $50,000 are not mandatorily referred, but the parties to a money damage lawsuit of any amount may consent to arbitration under the procedures set forth in the bill.

The final criterion is that the cases present predominantly factual issues, rather than complex legal questions, constitutional claims, or novel issues of law which may establish important precedents. These matters are the province of the federal judiciary. With cases involving arbitration, referral under the bill is to occur only after the disposition of pretrial motions, which will allow for the pre-arbitration resolution by the district court judge of many legal issues.

By applying the foregoing three criteria to the federal civil docket, we have concluded that money damage tort and contract cases are the groups of cases that are most suitable for arbitration. With respect to cases in which the United States is not a party, the language in the bill as now drafted covers most of these cases. However, we have more closely examined this issue since transmitting the statute to the Congress, and we believe now that section 644(a)(2)(B)(ii) should be amended to make it simpler and more comprehensive. Our amended version reads:

"(ii) jurisdiction is based in whole or in part on section 1331, 1332, or 1333 of this title, and the action is based on a negotiable instrument or contract or is for personal injury or property damage, except that an action brought pursuant to section 130 of the Truth-in-Lending Act (16 U.S.C. 1640) shall not be referred."

Under this amended provision all tort and contract cases under $50,000 are covered. These are matters that most commonly turn on questions of fact. They are cases that attorneys experienced in litigating before the federal courts could, with reasonable facility, determine the award a trial would produce. Thus, the arbitration process should present the parties in these cases with a result closely approximating what they could expect should they go to trial in the district court.

Cases arising under the truth-in-lending statute have not been included. This is a new, complex area of the law, involving voluminous regulations and still in need of published legal precedents. The computation of the amount of damages is automatic under a formula in the statute and would leave the arbitrator without discretion. Also, the losing party pays attorney's fees which are better set by a judge.

We have provided a separate category for cases in which the United States is a party. Many of these cases are treated differently from those involving private parties. For example, actions against the federal government arising out of contracts to which the government is a party must be initially tried before the United States Court of Claims. Others go through administrative proceedings not unlike arbitration before reaching the federal district court. For instance, the Federal Tort Claims Act requires that an administrative claim be filed and disposed of by the relevant agency as a predicate to a district court action. We do not believe that the parties to such actions should be required to go through an additional similar procedure.

We have been examining all money damages cases in which the United States is a party and are in the process of preparing a list of U.S. party cases to be arbitrated. The principle under which we are proceeding is that a category of

cases should be referred to arbitration if it meets the criteria set forth above unless there is a compelling reason not to refer it.

It is preferable to reserve United States party cases to regulation in order to maintain administrative flexibility. Statutory designation is best with cases in which the United States is not a party. The categories are simple and straightforward. Moreover, there is no obvious individual or agency to make prompt and informed decisions on the addition or subtraction of non-government cases from the group to be referred.

NUMBER OF CASES AFFECTED

It is difficult to predict precisely how many cases will be referred to arbitration under the legislation. I can, however, provide an impression of the magnitude of caseload that will be involved.

Nationally, 23,494 cases founded in tort and 19,928 cases founded in contract, in which the United States was not a party, were filed in the year ending June 30, 1977. This was out of a total of 130,567 civil filings that year.

Statistics provided by the Administrative Office of the United States Courts show that 7,396 of the 23,494 tort actions involved claims under $50,000. However, the amount of the claim was not reported in an additional 4,724 cases. If those are prorated among the cases where demand was reported, the number of cases under $50,000 rises to 9,257.

There were 9,007 contract cases under $50,000, out of a total of 19,928; 5,310 were unreported, resulting in an estimated total of 12,279 contract cases under $50,000. If, under the legislation, the Chief Justice were to select eight districts to participate, and together they processed ten percent of the federal district court caseload, then there would be on the order of 925 tort and 1,228 contract cases arbitrated in each year in those experimental districts. This would be enough to provide meaningful information on how well the process worked. As we develop the list of cases in which the United States is a party that are to be referred to arbitration, we will be able to provide some estimates on the expected volume of these cases. The numbers of United States cases, however, will undoubtedly be substantially below the foregoing private party totals, because the overall case totals in this category are initially well below those for private party cases.

I would like to add here that approximately 65% of the tort and 69% of the contract actions under $50,000 filed each year are filed under diversity jurisdiction. Elimination or reduction of diversity jurisdiction by the Congress would substantially reduce the number of these cases referred to arbitration.

HOW COURT-ANNEXED ARBITRATION WILL WORK UNDER S. 2253

The bill provides that the arbitration is to be conducted by attorneys who are experienced members of the Bar of the particular district court. To be certified as an arbitrator, an attorney must have been a member of the Bar of any state for at least five years and be currently admitted to practice before the certifying court. In addition, the attorney must be determined by the certifying court to be competent to perform the duties of an arbitrator. The Chief Judge will certify as many arbitrators as he determines to be necessary to implement the program. Thus, in each district a panel of attorneys experienced with federal court litigation will be maintained. It should be large enough so that no individual arbitrator will be called upon to serve more than two or three times a year.

Arbitrators are to be paid a fee to be set by the district court not to exceed $50 per case plus expenses, which may not include expenses for the procurement of office space. Service as arbitrators would be an excellent pro bono publico activity for the Bar. Lawyers are officers of the court and have an obligation to contribute to improving the administration of justice. It would be unfortunate if fees for arbitrators were set at such a level that it could be viewed as a program to enrich the legal profession. In addition, the modest fee will encourage arbitrators to dispose of cases expeditiously.

The proposed statute sets forth general procedures to be followed in all districts for cases submitted to arbitration. Cases are to be referred to arbitration by the clerk of the court immediately after the twentieth day following the close of pleadings, unless discovery or pretrial motions are filed with the court during the 20-day period.

If pretrial motions are filed, referral is made immediately upon the disposition of those motions. If discovery is commenced, up to 120 days is allowed for its completion. The case is then referred to arbitration.

These time periods were established in order to allow opportunity for the resolution of the case on the pleadings or by summary judgement or on other legal grounds and to allow the parties to conduct such discovery as can be completed within 120 days. Limited discovery may frequently be necessary in order that the parties are well enough prepared to be able to have a meaningful and fair arbitration proceeding.

Upon referral to arbitration, the parties have seven days to select their own arbitrators and to decide whether to have a single arbitrator in place of a panel of three. If they do not notify the clerk that they have selected their own arbitrators or that they want a single arbitrator, a panel of three arbitrators is selected at random by the clerk from the list maintained by the district court.

The arbitration hearing must commence within thirty days of the referral of the action to arbitration. At the hearing witnesses may be subpoenaed and the Federal Rules of Evidence are to be non-binding guides, except that privileged material may not be introduced. It is intended that these relaxed rules would permit the admission of some hearsay evidence, particularly in documentary form. For example, a written report might be introduced instead of having an expert witness testify in person.

Upon conclusion of the hearing, the arbitrators are to render an award promptly. This award becomes the judgment of the court in the case unless a party demands a trial de novo within twenty days. Where such a demand does occur, the case is placed on the civil docket of the court and treated in all respects as if it had never been referred to arbitration. No matters relating to the arbitration proceeding may be admitted in the trial de novo without the consent of both parties except for the use of testimony from the arbitration hearing for impeachment purposes.

It is our hope that the rate of demands for trials de novo will be relatively low, i.e., no higher than the 5 and 15 percent experienced in the states. There has been no state experience with cases at the $50,000 level. It is instructive, however, to note that in Pennsylvania the appeal rate of approximately ten percent did not rise, when the jurisdictional amount for the state's program was raised from $3,000 to $10,000.

Disincentives to demanding a trial de novo are included. Unless the party demanding a trial de novo obtains from the trial a judgment more favorable to him than the arbitration award, he would be assessed the costs of the arbitration proceedings, including the arbitrator's fees, and interest on the amount of the arbitration award from the time it was filed.

By allowing for a trial de novo, the right of parties to a federal court trial is preserved. The disincentives to appeal are included to cause the parties to consider more carefully whether the arbitration award constitutes a satisfactory resolution of the case. Congress has a degree of discretion in determining the manner in which the Seventh Amendment right to jury trial and the due process right to access to the federal courts are implemented (c.f. *Capitol Traction Co.* v. *Hof*, 174 U.S. 1 at 23,1899). Congress can establish a program such as this to expedite case disposition and to reduce the cost of federal litigation. It is also reasonable to provide for the allocation of the costs of the arbitration proceedings in a manner designed both to promote the purposes of the program (i.e., acceptance of the arbitrator's awards) and to allocate fairly the costs of the proceedings among the parties.

LOCAL RULE PILOT DISTRICTS

Last summer the Office for Improvements in the Administration of Justice conducted a survey of the Chief Judges of the United States District Courts to get their views about how to improve access to justice, especially for civil cases. Two-thirds of the Chief Judges participated. They gave a warm endorsement to the concept of court-annexed arbitration; an overwhelming majority thought it would reduce costs and delay for litigants and increase the overall efficiency of the judiciary.

Based on that reception, the Department of Justice has worked with the federal judiciary to provide a pilot project in court-annexed arbitration. Three federal district courts are now testing the arbitration process with local court

rules modeled after the proposed legislation: the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California.

While these local rule plans are modeled on the bill, there are interesting variations in procedures and in the types of cases submitted to arbitration in each of the districts. These variations should provide valuable experience in refining the details of the bill. The Federal Judicial Center is evaluating the local rule experiments. The Administrative Office of the Courts has been very cooperative in assisting with the implementation of court-annexed arbitration in the pilot districts.

Operating under local rule is not a satsiafctory long-term arrangement. If we are to have reliable information on how effective this program is and for what types of cases it is most useful, we need the three-year, thoroughly evaluated experiment that the statute would provide, as well as the larger, more systematically selected set of districts. And we need to be able to operate without the constraints under which local rule programs must operate. For example, there are limitations under the current local rules experiment on disincentives to appeal that may be utilized and there are restrictions on arrangements for compensation of arbitrators. While the pilot projects can operate for the moment under local rule, it would be far preferable to proceed for any substantial period with the explicit approval of the Congress. The types of cases to be arbitrated and the procedures to be employed should ultimately be established on a uniform national basis by the legislative branch. In short, the local rule pilot districts are providing a valuable warm-up for the main event, which should commence as soon as possible.

General Bell. I will summarize.

S. 2253 provides for an experiment in certain Federal district courts with mandatory but nonbinding arbitration of selected civil cases. This is a key element in the program of the Department of Justice to assure access to effective justice to all citizens and to improve the operations of our judicial system.

In that effort over the past year we have worked very closely with this subcommittee. We have been grateful for the counsel and cooperation you and your staff have provided us. As a result of our joint efforts, including the work of the Kastenmeier subcommittee in the House, a number of bills are moving forward which will have a salutory impact on the administration of justice in the Federal courts.

Each measure is directed at a particular part of the judicial process, and each would produce its own particular benefits. Expanding the role of magistrates will relieve district court judges of tasks that do not require their attention. Diversity jurisdiction reform will clear they way for more Federal judicial time to be given in Federal law questions.

The measure now before you to experiment with court-annexed arbitration for some types of civil disputes is complementary to these other measures. This bill seeks to broaden access for the American people to their justice system and to provide mechanisms that will permit the expeditious resolution of disputes at a reasonable cost.

Compulsory nonbinding arbitration of civil court cases has been utilized by several States with good results. In Pennsylvania, a court-annexed arbitration system has been in effect for over 25 years. Arizona, California, Michigan, New York, and Ohio have all successfully experimented with compulsory nonbinding arbitration.

The maximum value of claims that may be referred under the State arbitration systems varies from $3,000 to $10,000. The arbitra-

tors are practicing attorneys who receive a nominal fee for each case decided. They hear the evidence under relaxed rules of admissibility and render an award.

There is generally a trial de novo available in the trial court, but with financial disincentives placed upon such a demand. The State plans have generally fared well against court challenges, beginning with the decision upholding the constitutionality of the first program in Pennsylvania.

Appeal rates for trials de novo have ranged from 5 to no more than 15 percent of all cases arbitrated. This means that from 85 to 95 percent of all cases referred to arbitration terminate there. We have examined the particular procedures of the different State programs to determine what procedures would work best in the Federal system.

The proposed statutory plan, S. 2253, would authorize an experiment with court-annexed arbitration for specified categories of cases in five to eight district courts for a 3-year period. The legislation would also authorize any additional district court in the country to adopt the statutory experiment at the option of the judges. The Federal Judicial Center would evaluate the program and report to the Congress.

The bill sets forth specific categories of cases which would automatically be referred to arbitration before trial. These cases were identified on the basis of the following criteria: (1) claims for money damages only; (2) a ceiling of $50,000; and (3) a predominance of factual issues. Cases involving equitable relief or constitutional questions are excluded from the experiment. We have concluded that money damage tort and contract cases are the groups of cases that are most suitable for arbitration.

If eight districts were selected processing 10 percent of the Federal court caseload, there would be approximately 925 tort and 1,228 contract cases arbitrated in each year under the experiment.

We have provided a separate category for cases in which the United States is a party. Many of these cases are already treated differently from those involving private parties. Some go through administrative proceedings not unlike arbitration before reaching the Federal district court. We have been examining all money damages cases in which the United States is a party and preparing a list of U.S. party cases to be arbitrated.

This is how arbitration would work under S. 2253: Normal pretrial motions can be made, and discovery may be conducted for up to 120 days.

The hearing would be conducted by experienced attorneys assigned at random, or the parties can select their own arbitrators. The parties can decide whether to have a single arbitrator or a panel of three. The arbitrators are to be paid a fee to be set by the district court not to exceed $50 per arbitrator per case. After I finish this statement, I will say something about how we arrived at the $50 figure and will make a few other observations.

At the arbitration hearing, witnesses may be subpoenaed. The Federal Rules of Evidence are to be nonbinding guides, except that privileged material may not be introduced.

The arbitration award becomes the judgment of the court in the case unless a party demands a trial de novo within 20 days. Where such a demand does occur, the case is placed on the civil docket of the court and treated in all respects as if it had never been referred to arbitration.

Disincentives to demanding a trial de novo include the cost of the arbitration and interest if the party requesting the trial does not improve his or her position.

The Department of Justice has worked with the Federal judiciary to provide a pilot project in three Federal district courts under local court rules modeled after the proposed legislation: the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California. The Federal Judicial Center is evaluating the local rule experiments.

The Southern District of New York is about to commence an experiment using the Masters system. They are going to try using Masters to conduct arbitration, as well as other activities intended to expedite civil litigation.

While the pilot projects can operate for the time being under local rule, it would be far preferable to proceed for any substantial period with the explicit approval of the Congress. The types of cases to be arbitrated and the procedures to be employed should ultimately be established on a uniform national basis by the legislative branch. In short, the local rule pilot districts are providing a valuable warmup for the main event, which should commence as soon as possible.

That concludes my short summary, Mr. Chairman. I will answer questions.

Senator DeConcini. Thank you. I appreciate your statement, and we will review your written statement carefully.

I would like to bring you back to focus on the fee for the arbitrators under the bill of $50 per case. That seems like a small amount. I know you have some thoughts regarding the necessity to keep it down. Would you care to expand on that?

General Bell. Yes; I would.

I think Professor Meador came up with the term, "court-annexed arbitration." I think that is very good. I started out with my own thinking that this was a court adjunct, that the lawyers would be adjunct judges when they served as arbitrators, and that they would furnish an adjunct courthouse at the lawyer's office, so "court-annexed" is descriptive. I have talked a number of times with Craig Spangenberg and Ohio Chief Justice O'Neill about the Ohio arbitration experience. Craig Spangenberg and I spent nearly 5 years on the American Bar Commission on standards of judicial administration. We went into this in some depth. I find that in Ohio they always use three arbitrators. The chairman gets $50 and the other two members get $40. For that they have to handle three cases and not one.

That struck me as being a small sum. Then I thought how necessary it is for the lawyers of America to do something for this country, and to do something for the court system. Lawyers as a group are prosperous. There are many lawyers who would like to do this.

You could have no fee at all, but I thought a nominal fee would be in order.

I think it would be too bad if we were to pay regular time fees or any substantial fee to the lawyers for doing this public service. That's all it is. It is a public service. Not every lawyer wants to be a judge. Not every lawyer is qualified to be a judge or can afford to be a judge, but they can all do this. I think it would give the bar an opportunity to do something for the public.

Senator DeConcini. Would you conceive of the possibility of the lawyer not wanting to be an arbitrator and being able to be excused, or how would you handle that?

General Bell. There would be some who would not want to be arbitrators. They would not have to serve. But I do not expect to have difficulty finding enough lawyers willing to be arbitrators. They have not had any trouble in Ohio. Mr. Spangenberg knows more about this than I do, but Chief Justice O'Neill told me that in many places—they have arbitrators in Cincinnati and Cleveland—they have no trouble. I don't think you would have any trouble finding arbitrators in the State of Georgia, for example. Lawyers should be proud to render a service of this sort.

Senator DeConcini. We will hear from the American Arbitration Association. Apparently they do not have a problem getting lawyers to arbitrate or arbitrators.

General Bell. Yes.

I would like to add this. I have never favored Professor Meador's limited approach. He is somewhere in between me and the American Arbitration Association. He wants to try it on an experimental basis, with a sunset provision. There would be a report to the Congress and, if it is not working, we would do away with it.

I would like to see it done all over the country for one time because I am confident it will work.

But he has fixed it where you can do it by local rule all over the country.

Senator DeConcini. I thought that was a good alternative, Professor Meador.

General Bell. His approach is a little more cautious than mine.

Senator DeConcini. It is going to have a control group but it is not going to prohibit someone else striking out.

General Bell. I am well satisfied with the approach he has taken.

Senator DeConcini. What kind of reporting do we anticipate, Mr. Meador, with regard to the noncontrolled groups that are not selected by the Supreme Court Chief Justice.

Mr. Meador. There is no express provision in the bill for any reporting from any of the districts outside the five to eight designated experimental districts. However, I would anticipate and hope that the Federal Judicial Center, over this period of time, would see to it that similar data came in from those other districts so that we could have a picture of how it was operating everywhere that it was being used. There is nothing in the bill that requires that.

Senator DeConcini. Do you have any idea of how many districts might go into this?

Mr. Meador. Not specifically, but my experience of recent months is that a good many will be willing and anxious to do so. We went

around the country to get these three districts that Judge Bell already mentioned. They have started now by local rule. We encountered a good deal of receptivity to it, and, indeed, we have had other inquiries from other districts. Judges have written in asking for material on it saying that they are interested. So I would expect a good many, but I do not have any hard data.

Senator DeConcini. Perhaps Judge Bell or Mr. Beal would want to comment on this. We have received a letter on April 12, 1978 from the public citizens litigation group indicating that the Department of Justice arbitration experiment in the District of Connecticut goes beyond simple contractual and personal injury litigation to constitutional cases and civil rights cases. It is my understanding that this bill, S. 2253, centers upon tort and contractual cases where monetary damages are not in excess of $50,000. Would you care to comment about this observation?

Mr. Meador. In Connecticut, where one of the local rule experiments is going on, the judges there, on their own, wanted to include police misconduct cases under section 1343. That is, I think, what the letter refers to. That is a controversial and debatable provision. The judges there did that on their own, though. It was not a Department of Justice recommendation or position. Our bill would not include that.

I think this is one reason why legislation is important on this subject. Congress can specify clearly the cases that can be and that cannot be referred to arbitration.

Senator DeConcini. Thank you.

Our Staff Director, Romano Romani, is here, and Deputy Counsel, Michael J. Altier, have worked on this bill. I will defer to them for further questions.

Mr. Altier. I understand there are three district courts that are currently experimenting with compulsory nonbinding arbitration. Is the financial disincentive found in S. 2253 also provided for in each of the three local-rule experiments. If they exist, how if at all, they are different?

General Bell. Mr. Meador?

Mr. Meador. Let me have Mr. John Beal give you the exact information on that. There are varying aspects in each district. He has the details.

Mr. Beal. The provisions are these. In Connecticut, there is no financial disincentive to bringing an appeal. In Philadelphia, parties that demand a trial de novo but do not improve their position are assessed arbitrator's fees and, if the party appealing is the defendant, interest on the award. In California, they provide for the costs of arbitration as defined for costs of court cases under local rule, where the party appealing does not improve its position.

General Bell. No interest?

Mr. Beal. No.

I might also mention that this discussion presents a reason why a statute is important. There have been some questions raised concerning the extent to which it is permissible to proceed under local rule, without statutory authority, to invoke some of the possible disincentives. There is uncertainty in the pilot districts about which

can be legally proceeded with. We would feel much more comfortable with a statute in this area.

General BELL. I am not wedded to the idea of disincentives. When I was on the court, I found that nearly half the litigation was in forma pauperis. So we have the problem of putting disincentives on one party only in many cases. The other party can just sign a form of paupers' affidavit and escape paying. This is perfectly proper because they cannot pay. I think the committee would want to think about that in considering disincentives.

Mr. ALTIER. Under S. 2253, the Attorney General must indicate, by regulation, the type of cases that would be submitted to arbitration when the United States is a party. In your prepared statement you indicated that you are currently in the process of preparing such a list.

When do you expect this list to be completed and what types of cases would be included?

General BELL. When I file a statement, sometimes I speak in expansive language. When I said I was preparing that list, that meant Professor Meador and John Beal were preparing it.

[Laughter.]

So, I will defer to them.

Mr. MEADOR. We are in the process, as it says. This involves consultation with all the litigating divisions in the Department that handle U.S. Government litigation, to get their views as to what might appropriately be included.

That is going on right now. I would think it is something that might be put together within the next few weeks.

I'll ask John Beal to elaborate on that a bit, because he has actually done a lot of the consulting with the other divisions.

Mr. BEAL. The basic process that we are following is to look at the tort and contract cases in which the Department is involved, and which entail money damage only under $50,000. We are identifying these cases and deciding whether any of them ought not go to arbitration. Perhaps, for example, it would be unfair to the parties because they have already been through the U.S. Court of Claims or before an administrative law judge. The fact that they have done so does not necessarily mean they will be excluded, but we are going through the entire list of cases that we handle in this area and putting particular matters in or out.

I think that within 1 month to 6 weeks we should have a list together, which we would be glad to make available to the committee.

Senator DECONCINI. Thank you.

Without objection, the record will remain open at this point for the purpose of inserting the additional material referred to by Mr. Beal.

[Material to be supplied follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE,
Washington, D.C., June 24, 1978.

Hon. DENNIS DECONCINI,
Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During the hearing before your Subcommittee on April 14, 1978, on the proposed arbitration legislation (S. 2253), Attorney General

Bell and I agreed to provide the Subcommittee with a list of classes of cases in which the United States is a party that would be referred to arbitration. Under the bill the Attorney General would determine by regulation the types of cases in which the United States is a party that would be referred to arbitration. It is the intention of the Department of Justice that the regulation initially would contain the categories of cases set forth in the attached list. It should be noted that these proposed categories would be subject to the formal requirements of the Administrative Procedure Act for the promulgation of regulations, such as published notice and opportunity for comment by the public and other agencies.

We also agreed to submit to the Subcommittee a memorandum on the constitutionality of such arbitration legislation. Enclosed is an opinion of the Department's Office of Legal Council on that subject. Specifically, the memorandum addresses the constitutionality of mandatory referral of civil cases to arbitration and of the provisions for the allocation of costs contained in the substitute bill to S. 2253 that I understand the Subcommittee will be considering.

Finally, I am enclosing a report summarizing the May 24 meeting of representatives from the three districts which have undertaken arbitration procedures by local rule.

If you wish additional information, please do not hesitate to contact me.

Sincerely,

DANIEL J. MEADOR,
Assistant Attorney General.

Attachments.

Civil actions in which the United States is a party, in which the relief sought consists only of money damages not in excess of $50,000, exclusive of interest and costs, and which:

1. Arise under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et. seq.*, unless the District Judge determines that a legal issue relating to the jurisdiction of the court cannot be resolved prior to trial.

2. Are based upon a negotiable instrument or a contract or are for personal injury or property damage and jurisdiction is based in whole or in part on sections 1331, 1345 or 1346 of Title 28, United States Code;

3. Arise under 15 U.S.C. 15a;

4. Involve any of the following statutes:

(a) 12 U.S.C. 1749 bbb;
(b) 12 U.S.C. 1709, 1715l, 1715m, 1715y, 1715z, 1715z–1, 1715z–2;
(c) 42 U.S.C. 4201;
(d) 12 U.S.C. 1701 *et seq;*
(e) 20 U.S.C. 1071 *et seq;*
(f) 38 U.S.C. 1681, 1682;
(g) 15 U.S.C. 634, 636;
(h) 42 U.S.C. 1395f(b), g,h, or hh; or

5. Are in Admiralty with jurisdiction based in whole or in part upon section 2 of the Act of March 9, 1920, as amended (46 U.S.C. 742) or section 1 of the Act of March 3, 1925 (46 U.S.C. 781), except that no such case shall be referred for arbitration if it involves general average;

except that no case described above shall be referred to arbitration if:

1. The action is based in whole or in part on the allegation of a violation of a right secured by the Constitution;

2. Relief is sought from a federal official or employee personally for an act performed by such official or employee within the outer perimeter of his official duties, whether or not the action is also brought against the United States or a United States official in his official capacity;

3. The action is by the United States and is based upon fraud or to recover money or property illegally or improperly paid to or obtained by an employee or former employee of the United States or any agency thereof;

4. The Attorney General determines that the resolution of the issue of liability in the case is likely to affect the resolution of claims in other cases arising from the same factual occurrence and the sum of the damages claimed in all such cases will exceed $50,000;

5. The relief sought involves a forfeiture, fine or penalty.

Mr. ALTIER. Under the proposed statute, in order to be certified as an arbitrator, an attorney must have been a member of the bar of any

State for at least 5 years and be currently admitted to practice before the certifying court.

In addition, the attorney must be determined by the certifying court to be competent to perform the duties of an arbitrator.

What has been the experience in the three pilot experimental courts with regard to this determination of the competence of the arbitrators?

Mr. MEADOR. Basically, in these experimental districts, they are ascertaining whether the lawyer has had any disciplinary proceedings in the past, or anything currently pending of that sort. Otherwise, they are by and large taking all volunteer lawyers. There is, of course, leeway for the judges to exercise some judgment if they think a lawyer is simply temperamentally or otherwise not suitable to sit as, in effect, a judge, or an arbitrator, between parties. These can be left off the list.

Those experiments are very new, of course. They are just now getting underway. So there has been limited experience thus far.

General BELL. It is rather informal to date, is that right?

Mr. MEADOR. Yes.

General BELL. I would imagine that would be the way to work it everywhere. The clerk of the court would be the one who gets up the list in most places. As lawyers, we know that is perfectly satisfactory.

Mr. ALTIER. In the case of an extraordinary complex case in which money damages are not in excess of $50,000, would it be possible for a hearing before the arbitrators to extend beyond a day or two? This probably would not happen very often, but if it did, what would be your reaction to a mechanism which would authorize a higher fee for this type of situation?

General BELL. There would still be cases where the courts would want to use a master in place of an arbitrator, and a master would get paid a substantial fee. I would say the court should have discretion about that.

Mr. ALTIER. About the higher fee?

General BELL. Yes. Where there is a complex matter. Would not the court have discretion not to refer it, or is the referral compulsory?

Mr. MEADOR. Under the bill, the referral is automatic. However, it would be possible to build in provisions to take care of that. For example, in the Northern District of California, there is a provision that on motion of a party and the making of a showing to the court that the case is unusually complex or otherwise unsuitable for arbitration, the judge can order that it not be referred.

In Connecticut, they have a provision that fees are imposed of $250 a day after the first 2 days. The parties have to agree to that or the case is returned to the trial court. That is another way of building in a safeguard to get a complex case out of the arbitrators' hands and back into court.

There are ways that this can be dealt with, and perhaps some thought ought to be given to writing into the bill a provision that would allow a mechanism of that sort.

Mr. ALTIER. I have two more questions.

The first concerns the financial disincentive. What are your thoughts on whether the financial disincentive would be constitutional?

Mr. MEADOR. Yes, we do. We believe it is constitutional. There are various ways in which Congress has, and can design procedures, that, in one way or another, affect jury trials and control access to a jury.

We think the kind of limited disincentives we have here, in context, are a reasonable and constitutional type of provision.

Now, we can develop that point more thoroughly for the committee, and we will gladly submit that to you.

Senator DECONCINI. Would you give us an opinion? If your staff has the opportunity to delve into any other areas that Congress might have designed in comparison to this area, it would be very helpful.

Mr. MEADOR. We will be happy to submit this.

Senator DECONCINI. Without objection, the record will remain open for the purpose of inserting this additional material.

[Material to be supplied follows:]

MEMORANDUM FOR DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, DEPARTMENT OF JUSTICE

Re Constitutionality of certain provisions of draft bill on arbitration.

This responds to your request of June 19, for our comments on the constitutionality of certain provisions in a draft bill to authorize federal district courts to refer certain civil actions to arbitration.

The bill would amend title 28 of the United States Code to add a chapter on arbitration. The key provisions of the bill may be summarized as follows: It would empower federal district courts to authorize arbitration by local rule. Section 644 would allow a district court to refer to arbitration any civil case pending before it if: (1) the parties consent to arbitration, or, (2) the relief sought consists only of money damages not in excess of $100,000, exclusive of interest and costs, and if

"jurisdiction is based in whole or in part on sections 1331, 1332, 1333, 1345, or 1346 [of title 28 U.S.C.] or sections 742 or 781 of title 46, and the action is based on a negotiable instrument or contract or is for personal injury or property damage * * *."

However, no case could be referred to arbitration if (1) based on a claimed violation of a right secured by the Constitution, (2) relief is sought from a governmental official or employee "for an act performed by such official or employee within the outer perimeter of his official duties," (3) the United States seeks to recover money or property fraudulently and illegally obtained by a present or former governmental employee, or (4) jurisdiction is based in whole or in part in section 1343 of title 28 U.S. Code, §644(B)(i)–(iv).

An arbitration award would be filed with the clerk of the district court and would become a final, unappealable judgment unless a party, within 30 days after the filing of the award, demands a trial de novo in district court. §646. Where a trial de novo is timely demanded the action would be replaced on the court's docket and treated as if it had not been referred to arbitration. §§646 and 647.

Evidence adduced at the arbitration hearing or findings relating thereto would not be admissible in the court action, except testimony given at such hearing could be used for impeachment. §647(c).

If a party, after demanding a trial de novo, fails to obtain in the district court a judgment, exclusive of interest and costs, more favorable to him than the arbitration award, the court may tax against that party costs of the arbitration proceedings as provided in 28 U.S.C. §1920, and the amount of the arbitrator's fee. §647(d).

The bill has a "sunset provision" providing for its termination three years from the date of enactment except with respect to cases referred to arbitration prior to the termination date. §648.

Finally, arbitration under the bill would be implemented on a test basis in no fewer than five nor more than eight "representative districts" to be designated by the Chief Justice of the United States, after consultation with the Attorney General. § 2(a).

You have requested our views on the constitutionality of "(1) the general question of the mandatory referral of cases to arbitration and, (2) the costs provision, subsection 647(d)." For the reasons that follow we believe no constitutional prohibitions limit Congress' power to enact either of these provisions.

MANDATORY REFERRAL ARBITRATION

The basic legal issue raised by the compulsory-arbitration provision is whether it would unconstitutionally burden the parties' access to the federal courts or unduly hamper their right to trial by jury. Also, equal protection questions must be considered inasmuch as the bill would apply only to certain classes of cases and to a limited number of districts.

We turn first to the questions of access to the federal courts and the right to jury trial. We note at the outset that many courts have upheld compulsory-arbitration statutes; however, most stress that for such a statute to be constitutional there must be provision for judicial consideration of the issues decided in arbitration. *Application of Smith*, 381 Pa. 223, 112 A. 2d 625, *appeal dismissed, sub, nom. Smith* v. *Wissler*, 350 U.S. 858 (1955); *Dearborn Fire Fighters Union Local No. 412, IAFF* v. *City of Dearborn*, 42 Mich. App. 51, 201 N.W. 2d 650 (9172). See also *Mengel Co.* v. *Nashville Paper Products & Specialty Workers Union*, 221 F. 2d 644 (6th Cir. 1955), and *Hjelle* v. *Sornsin Construction Co.*, 173 N.W. 2d 431 (1969). The bill, of course, allows for full judicial review with its provision for a trial *de novo*.

In *Application of Smith, supra*, the Supreme Court of Pennsylvania held that, because of its provision for trial *de novo*, a court rule requiring compulsory arbitration of certain cases did not violate the state constitution's guarantee of the right to trial by jury. Quoting from *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 23 (1899), the court stated:

"It [the Constitution] does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it."

In our view, *Hof* supports the validity of the basic condition which the present bill would place upon the right of trial by jury.[1] Given the obvious purposes of the bill, i.e., to reduce the court docket and to expedite the resolution of litigation, we believe the bill's compulsory-arbitration provisions would satisfy the reasonableness test articulated in *Hof*.

Further, the arbitration provisions seem rationally related to a legitimate congressional concern—the effective functioning of the courts. Thus, any inconveniences claimed to result from compulsory arbitration would not overshadow Congress' interest in passing the legislation.

We conclude, therefore, that the bill's requirement of arbitration would not violate the Seventh Amendment or any general due-process-based right of access to the courts.

The bill would establish several types of classification of cases, none of which, in our view, would contravene the equal protection standards of the Fourteenth Amendment as embodied by judicial decision in the Due Process Clause Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1953).

Because equal protection issues are presented, one question is whether the bill's classifications must be supported by a "compelling governmental interest" or whether the existence of a rational basis would suffice. It does not appear that the stricter standard would be applicable. First, the only possible basis for asserting that there is a "suspect class" would be disproportionate impact upon the poor. Similar arguments were rejected in recent decisions of the Supreme Court. *United States* v. *Kras*, 409 U.S. 434 (1973); *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973) (per curiam). The other kind of case in which the stricter standard applies is one involving a "fundamental right." It does

[1] In *Capital Traction Co.* the Court upheld a federal statute which provided that certain actions in the District of Columbia were to be tried before a justice of the peace, subject to the right of trial *de novo* in a court of record. Applying a reasonableness test, 174 U.S. at 44–45, the Court found that the statute did not unreasonably obstruct the right to trial by jury.

not appear that the interest here at stake is within that category. It appears that the only articulable interest involved is in having a jury trial at the initial step of a proceeding. As *Ilof* makes clear, deferral of the right to trial by jury must only meet a reasonableness standard. See footnote, p. 6, *supra*.

A further equal protection consideration arises from the fact that the compulsory-arbitration provisions would not necessarily be applicable in all federal district courts. While any court could implement those provisions, only a handful of districts (five to eight) would be required to do so. See §2(a). It seems likely that some districts would decide not to provide for use of compulsory arbitration. If so, a party in a district where arbitration was required might assert that he is being denied equal protection—the denial resulting from the fact that identical suits in other districts would not be subject to the requirement of arbitration.

However, it is doubtful that such an argument would succeed. Presumably, there are important differences among districts with respect to such matters as backlog of cases, number of cases per judge, etc. It is well established that legislative reform may proceed one step at a time. Similarly, it can be assumed that, if a district elected to provide for arbitration, there was a reasonable basis for doing so; and the failure of other districts to make such an election would not translate into a denial of equal protection to persons who are subjected to compulsory arbitration. The other equal protection issues relate not to the geographic scope of arbitration, but to the types of law suits that would be covered. These cases are those based upon the following jurisdictional sections: Federal question (28 U.S.C. 1331), diversity (28 U.S.C. 1332), admirality (28 U.S.C. 1333 or 46 U.S.C. 742 and 781). United States as plaintiff (28 U.S.C. 1345), or United States as defendant (28 U.S.C. 1348). In addition to these jurisdictional bases, for cases to be subject to compulsory arbitration, the relief sought must be solely for money damages, and then not in excess of $100,000. Further, the action must be based on a negotiable instrument or contract, or for personal injury or property damage. The section-by-section analysis accompanying the bill explains that:

"The general class of cases to be arbitrated is, thus, money damage, tort and contract actions under $100,000. This is the group of cases on the district court docket most suitable for arbitration. These cases generally present factual questions relating to liability or damages. They are the type of cases that have been successfully arbitrated at the state level under similar programs."

However, although a case may fit within all of the qualifying criteria to be subject to compulsory arbitration, there are certain exceptions. See p. 2, *supra*. The rationale for these exceptions is set forth in the section-by-section analysis accompanying the bill. It is there stated that the common thread through all of the exceptions is that they "involve sensative (sic) questions of policy in the protection of the public or of individual rights."

These distinctions on their face appear to be rational. However, it may be desirable for the legislative history of the bill to elaborate more fully on the justifications for these distinctions so as to bolster the rational basis for these classifications.

SECTION 647(d)—TAXING OF COSTS PROVISION

Section 647(d) reads as follows:

"If the party that demanded a trial de novo fails to obtain in the district court a judgment, exclusive of interest and costs, more favorable to him than the arbitration award, the court may tax against that party costs of the arbitration proceedings as provided in section 1920 [title 28 U.S.C.][2] and the amount of any arbitrator's fees."

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[2] Section 1920 provides that:
A judge or clerk of any court of the United States may tax as costs the following:
(1) fees of the clerk and marshal;
(2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) fees and disbursements for printing and witnesses;
(4) fees for exemplication and copies of papers necessarily obtained for use in the case;
(5) docket fees under section 1923 of this title.
A bill of costs shall be filed in the case and, upon allowance included in the judgment or decree.

The legal question is whether this provision would unduly penalize litigants for asserting their right to trial in the district court and, where applicable, the attendant right to jury trial.

In our view, this provision is constitutionally permissible. In *Application of Smith, supra*, 112A. 2d at 630, the Pennsylvania Supreme Court upheld a provision which required the party seeking *de novo* review to pay the arbitrator's fees. And in *Capital Traction Co.* v. *Hof, supra*, 174 U.S. at 43, the United States Supreme Court sustained a requirement that the party seeking a *de novo* trial, after a trial before a justice of the peace, provide security for payment of the final judgment. Thus, it seems clear that the present provision is more favorable to such parties than is necessary since they could only be assessed costs if their court recovery were less than the arbitration award. Further, even in cases where the bill would permit taxing of arbitral costs, imposition thereof would remain within the court's discretion.

We believe the reasoning of *Lockett* v. *Hellenic Sea Transports Ltd.*, 60 R.F.D. 469 (E.D. Pa. 1973), is supportive on this issue. Plaintiffs in that case challenged the constitutionality of §§1920 and 1923[3] of title 28 U.S. Code, claiming that these provisions have the invidious effect of discouraging persons of limited means from pursuing their civil remedies in federal court. Plaintiffs specifically claimed that sections 1920 and 1923 impinged upon their Seventh Amendment right to jury trial.

In rejecting these claims the court reasoned:

"Upon review of Sections 1920 and 1923 of Title 18, we find that they bear a reasonable relationship to the needs of this Court and are constitutional on their face. They deprive no litigant of his day in court, but simply require him or her to consider with some degree of care whether or not their case has merit or is totally frivolous. We do not believe that it is unreasonable for this Court to require plaintiffs to consider carefully their cause of action before they burden this Court with their trial and the defendant with the costs of a defense."[4]

Similarly, subsection 647(d) would not deprive a litigant of his day in court. It would merely require that he consider "with some degree of care" whether the demand for a trial *de novo* was frivolously made.

Thus, we perceive no constitutional infirmity in the bill's provision respecting costs.

In conclusion, for the reasons herein started we are of the opinion that there are no constitutional barriers to the enactment of the provisions in question.

JOHN M. HARMON,
Assistant Attorney General,
Office of Legal Counsel.

General BELL. I would not like to see the legislation held up because of doubt about the disincentives. I would rather give up the disincentives if we have to. I think it would be helpful not to delay in that regard.

Mr. ALTIER. My last question concerns the subject of discovery under the bill. If discovery is initiated, why shouldn't the parties be allowed to complete discovery as they do under some of the State programs that I am aware of, as opposed to the requirement of an arbitrary 120-day limit as found under the bill?

General BELL. Some of the most successful trial courts today put time limits on discovery. One of the best judges I know of is in Miami, Fla. He handles a lot of complex litigation. He schedules it when you file, he tells you how many days you have for discovery, and that is all you get. He tells you when you are going to try the case.

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[3] Section 1920 is discussed *supra*. Section 1923 allows for the taxing of docket fees and the costs of briefs.

[4] In this regard, see also *Berner* v. *British Commonwealth Pacific Airlines Ltd.*, 362 F. 2d 799 (2d Cir. 1966), *cert. denied*, 385 U.S. 948 (1966).

I would say that if we had more judges doing that we would not be in the shape we are today. We would have judges that take charge of cases.

Mr. ALTIER. Thank you very much.

Senator DECONCINI. Let me ask one or two questions.

How did you arrive at the $50,000 figure? It seem like an awfully high amount on an experimental basis.

Mr. MEADOR. Obviously, any figure you take is a figure that is maneuverable up or down. We took it because, first, if diversity cases remain to an extent in the Federal courts—and we don't know how that will come out in this Congress—then you are starting at $10,000. That is the floor. So, we thought some range above that was necessary.

A lot of litigation today, with inflation and whatnot, runs well above $50,000. We have no strong opinion on that figure. That is obviously a negotiable and movable figure—$25,000, $30,000, and $60,000—and people differ on it.

Senator DECONCINI. Fine. I wanted to know if there was some magic about that figure.

Inasmuch as there are three experimental sites in California, Connecticut, and Pennsylvania, which are just commencing their individual programs, do you think there is any benefit for us to wait and see what your preliminary evaluations are of those particular experimental sites before we hold additional hearings?

Mr. MEADOR. I would suggest that it is not necessary to wait very long. Those programs are now underway. Those are high volume districts. They are going to get a good deal of experience very fast.

Our hope is that the subcommittee will move along so that this measure could get reported out in this session of Congress.

I cannot be more exact than that. I do think we will get a lot of experience fast, and we will get it up as fast as we can and make it available to the subcommittee.

Senator DECONCINI. Do you think you will have some material in the next 30, 60, or 90 days, that is, would you have any preliminary things for us to review? What is your time schedule?

Mr. MEADOR. Yes. Certainly within 30, or 60, or 90 days. In that time frame; yes. We'll have some information.

Senator DECONCINI. One more question. Mr. Meador, maybe you have given some thought as to how you think this would interphase with the Magistrates Act that we passed in the Senate, and assuming the House passes it, do you see some interphasing of these?

Mr. MEADOR. As Judge Bell said, this measure is complementary to other measures pending, such as magistrates. There is no inconsistency, and indeed the two are not necessarily linked together. They can stand separately.

The magistrates will provide an additional resource to the district courts for those cases that properly should and do remain in the court. The magistrates would help process them and, indeed, decide some of them subject to appeal.

This measure is complementary in that it picks out, or selects, certain kinds of cases which seem particularly susceptible to early,

quick disposition through an arbitration process. The magistrates would have little or nothing to do with these cases except for discovery for up to 120 days. You would have magistrate participation in that.

General BELL. Some of the cases when they come on for de novo trial might go to the magistrates.

Senator DECONCINI. That is probably what we are talking about. The bulk of those cases are going to the magistrates under that Magistrate Act.

General BELL. Yes. That is what I would foresee.

Senator DECONCINI. Gentlemen, that is good testimony. We appreciate very much that testimony.

General BELL. Thank you, Senator.

Senator DECONCINI. Our next witness is Mr. Robert Coulson, President, American Arbitration Association.

Mr. Coulson, we thank you for coming. We are pleased to have you.

How come you guys don't pay $50 for each case?

Mr. COULSON. Sometimes we pay more. [Laughter.]

Senator DECONCINI. Yes; I know. I've been an arbitrator and member of your association for a long time.

Mr. COULSON. I know that. We appreciate it.

Senator DECONCINI. Please proceed.

STATEMENT OF ROBERT COULSON, PRESIDENT, AMERICAN ARBITRATION ASSOCIATION, NEW YORK, N.Y.

Mr. COULSON. I would like at the outset to ask that my formal statement and some backup materials be submitted.

Senator DECONCINI. Your statement will appear in the record in full at this point.

[Material follows:]

STATEMENT BY ROBERT COULSON, PRESIDENT OF THE AMERICAN ARBITRATION ASSOCIATION, NEW YORK, N.Y.

My name is Robert Coulson. I am President of the American Arbitration Association, a national, not-for-profit, public service, educational corporation, which provides process management for out-of-court dispute settlement systems. For over fifty years, here and throughout the country, the Association has helped and encouraged parties in the use of voluntary arbitration, mediation and conciliation, democratic elections and other impartial systems to settle many types of controversies in a wide variety of fields. The Association's current caseload is in excess of 47,000, including commercial, labor, insurance, criminal, domestic relations and many other varieties of disputes. Our National Panel is made up of over 50,000 arbitrators. These men and women are experts in a wide variety of fields and have made themselves available to hear and determine those cases for which they are qualified and acceptable to the parties involved.

I am appearing as a representative of the American Arbitration Association to comment on S. 2253, which promises that it will "promote the prompt, informal and inexpensive resolution of civil disputes by encouraging greater use of arbitration on a voluntary basis and by authorizing, under the conditions specified in this Act, the courts to refer certain cases to arbitration in certain districts."

This legislation seems to be mislabeled. By traditional definition, arbitration is "the referral of a dispute by voluntary agreement of the parties to one or more impartial arbitrators for a final and binding decision." Arbitration is voluntary. It offers a free choice of arbitrators. It is final and binding.

The "arbitration" system to be created by S. 2253 is not voluntary. Nor would its awards be final.

This legislation would cover specified classes of cases in selected districts. The concept is patterned upon state court programs where compulsory nonbinding arbitration has disposed of significant numbers of relatively small cases. The system in Philadelphia was one of the earliest such programs. It has been copied by other urban court systems with some success.

S. 2253 represents an attempt to impose a similar process upon certain kinds of cases in the Federal courts. The controversies covered by this legislation would include Miller Act claims, where a supplier to a Federal construction contractor is suing under a performance and payment bond; Jones Act cases, where a seaman is suing for personal injuries suffered in connection with employment; and diversity of jurisdiction suits involving contracts and negotiable instruments or claims for personal or property damages. Suits in excess of $50,000 would not be subject to the system, unless the parties were willing to submit their case to the process.

The true purpose of this mechanism is to encourage parties to accept the judgment of impartial lawyers, thereby inducing settlements. For that purpose, the procedure may come too late in the litigation process. The "arbitration" is to take place after the pleadings, after the preliminary motions and after 120 days of discovery procedures. A mandatory screening procedure installed at an earlier stage might settle more cases. Pretrial procedures have been the cause of substantial delays and are expensive and time consuming. Perhaps arbitration should be installed earlier in the process.

As to Miller Act cases, a more specific concern arises. The national construction industry, through its various associations and professional societies, has created a comprehensive system of voluntary arbitration, administered by the American Arbitration Association. These procedures are sponsored by a National Construction Industry Advisory Committee. A national panel of arbitrators, made up of persons actively engaged in the construction industry, provides a pool of qualified arbitrators. Each year thousands of cases are arbitrated on a voluntary basis in accordance with building contracts that refer to the Construction Industry Arbitration Rules. A booklet describing the system is attached hereto.

The issues being arbitrated under such contracts are similar to those arising in Miller Act cases in the Federal district courts. This being so, it might be preferable to permit parties to submit Miller Act issues to the same kind of arbitrators: engineers, architects, builders and other persons who are personally engaged in the construction industry, rather than to restrict them entirely to attorneys, some of whom may not be familiar with construction issues.

Jones Act cases are not now arbitrated, although arbitration is used frequently for personal injury claims under the uninsured motorist coverage of many automobile insurance policies and under the no-fault automobile laws of New York and a few other states. Here again, a special category of attorneys could be selected to hear Jones Act cases. These cases involve technical issues of tort law. In traditional arbitration, parties have the right to select from a list of experts. Why shouldn't they have the same rights under this procedure?

Legislation is now being considered which would eliminate diversity cases from the jurisdiction of the Federal district courts. S. 2253 would require certain diversity parties to participate in nonbinding arbitration. If the diversity bill passes, diversity would be eliminated from the operation of this Bill.

Turning to specific procedures, the Bill provides that arbitrators are to be certified local attorneys with five years' practice. These persons are to be designated by the chief judge as competent to perform the duties of an arbitrator. There is no definition of the criteria to be considered by the chief judge. Nor is there any indication that arbitration training would be provided. Based upon our experience, such training could and should be provided. The AAA has recently trained mediators in Neighborhood Justice Centers being sponsored by the Justice Department. Since the arbitrators acting under S. 2253 would not be rendering binding awards, their influence would be strengthened if they had strong mediation skills.

Arbitrators are to be paid $50 for each case. Trial attorneys may ask whether that is adequate for the services to be provided. Community leaders have been willing to serve as arbitrators on a voluntary basis as a contribution

to their community. But where the award is not binding, one wonders whether attorneys will want to contribute their services for such nominal compensation.

Under Section 647 of the Bill, the arbitrator's award is not enforceable. The award may not be mentioned at any subsequent trial. Therefore, a losing party would abide by an award either out of respect for the arbitrators or because the terms of the award reflected successful settlement discussions.

In addition, the Bill contains a complicated penalty formula. Its application is unclear. How does the formula apply to counterclaims or to multiple parties?

Three pilot experiments are already being carried out in the Connecticut, Eastern Pennsylvania and Northern California districts, without the benefit of any action by the Congress. If it is possible to experiment in this way without legislation, one wonders why the matter is now before your Committee.

I would like to confirm the continuing interest of the American Arbitration Association in attempting to aid court systems in making maximum use of the arbitration process. Voluntary arbitration has greatly reduced the burden upon the nation's courts. One corporate purpose of the American Arbitration Association is to encourage the further expansion and use of such systems. Attached is a copy of our By-Laws.

In my remarks, I have pointed out that the "arbitration" contemplated by this statute differs from voluntary, binding arbitration. This compulsory, nonbinding system would attempt to induce settlements in certain categories of cases in certain district court systems. I recommend that the Bill be recast to eliminate the confusion between this technique and voluntary, binding arbitration.

If the primary intent of this Bill is to relieve court congestion, you will have to determine whether this is the best way to meet that objective. A task force report at the recent judicial conference at Williamsburg raised serious concerns about such an approach—"a mandatory system providing nonbinding judgments." According to that report, "such a process may do no more than increase delay in the litigation process by forcing the parties to go through a pretrial trial." But the choice is yours.

If the Congress concludes that it is appropriate to require certain parties to participate in such a procedure before obtaining a court trial, the American Arbitration Association might be helpful in the training and selection of arbitrators, or possibly in the administration of certain procedures. We believe that the Bill would be improved by providing expert construction arbitrators for Miller Act cases and expert maritime arbitrators for Jones Act cases.

We hope to assist in the reforms contemplated by the Kennedy amendment to Senate 957, which would create a dispute resolution resource center. Here, jointly with the American Bar Association and the National Center for State Courts, the American Arbitration Association is seeking to encourage increased use of alternative dispute settlement mechanisms. We agree with Chief Justice Burger's statement that alternative methods of dispute resolution should be encouraged.

I appreciate the opportunity to appear before your Committee.

Mr. COULSON. On behalf of the American Arbitration Association, we deeply appreciate your invitation to testify on this bill.

My primary motivation in wanting to tell you about the association's position on the bill is to be sure that it is fully understood by the Senate and the Congress, and the American public, that there is a substantial difference between voluntary binding arbitration, which has been quite well accepted by the American public in millions of contracts and hundreds of thousands of cases each year, and this new form of arbitration which, as you very clearly stated in your introduction, is mandatory, nonbinding arbitration.

These are two different mechanisms. They have different purposes and I think that it would be very important in the writeup of the bill, to be sure that both in the title of the legislation and also in its purposes, that you state quite clearly that this is mandatory, nonbinding arbitration.

The stated purposes of the bill, as presently written, say that the purpose is "to promote the prompt, informal, and inexpensive resolusion of civil disputes by encouraging greater use of arbitration on a voluntary basis."

It is clear from reading the substance of the bill that encouraging voluntary arbitration is not its primary role.

The primary purpose of this mechanism is to encourage parties to settle more cases by requiring them, in the covered cases, to go through a preliminary mock trial, and then to impose certain penalties on those parties that wish to go forward for a trial in the courts. Therefore, to some extent, rather than "broadening the access" to the courts as the Attorney General stated in his introduction, this is a new barrier in the Federal litigation process which will stand between certain parties and their ultimate trial in court.

Our experience, as an administrative agency in hundreds of thousands of cases over the past 52 years, in cases that were brought to us voluntarily by businessmen, by labor unions, and by consumers, would indicate that there are some ways that this legislation could be improved, if the Senate and the Congress determine that it would serve a useful social purpose to mandate this new mechanism of nonbinding mandatory arbitration in the Federal litigation system.

For one thing, we have found that many parties in arbitration cases similar to the Miller Act cases, which are one major class of cases that would be included in this law, would prefer to try their cases before experts from their industry who would be familiar with the problems that would arise in that type of case. If Miller Act parties were permitted to opt for voluntary arbitration, I think that a large number of them would prefer to use arbitration. Arbitration has been included in most standard form construction contracts in this country. They usually include a reference to the national construction industry arbitration system. I have attached a description of that system in the material which I have submitted.

In the same way, Jones Act cases involve complicated issues of Federal tort maritime law. I think that it would improve the quality of decision making and the quality of judgment which would be involved in this kind of mechanism, if the arbitrators that were available for Jones Act cases were experts in the maritime, personal injury trial bar, rather than simply lawyers taken from a list on a rotation basis.

So, we think that both in the Miller Act cases and the Jones Act cases, and perhaps in other categories of cases, it would be preferable for the court to make available a specialized, professional, expert list of arbitrators, rather than the mechanism that the statute now contains.

For some technical problems which seem to be involved in this legislation, I would like to refer your committee to a 38-page report that was recently filed with you by the Committee on Federal Courts of the Association of the Bar of the City of New York. It goes into great detail as to some of the technical, legal problems that are involved in the present draft. I recommend that report to you and to your staff.

Senator DeConcini. Without objection, the report referred to by Mr. Coulson will be inserted into the record at this point upon receipt.

[Material to be supplied follows:]

REPORT BY THE COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON PROPOSED LEGISLATION TO PROVIDE FOR COMPULSORY NONBINDING ARBITRATION OF CERTAIN CASES IN FEDERAL COURTS

INTRODUCTION

The Attorney General of the United States has proposed legislation (S. 2253 and H.R. 9778) which provides for compulsory but nonbinding arbitration of certain categories of litigation in federal district courts. The ostensible purpose of the legislation is to "promote the prompt, informal, and inexpensive resolution of civil disputes." The bill would create a new Chapter 44 of the Judicial Code, Title 28, entitled "Arbitration." Our Committee unanimously disapproves of this proposed legislation for the reasons set forth below.

OUTLINE OF THE BILL

A. Scope

The bill would mandate arbitration in accordance with its provisions in not less than five nor more than eight "representative" districts to be designated by the Chief Justice after consultation with the Attorney General. The new legislation would be implemented on an experimental basis for a three-year period, at the end of which the Federal Judicial Center, in consultation with the Attorney General and the Administrative Office of the United States Courts, would report to the Congress on the use, effectiveness and benefits of arbitration in the test districts and such other districts as may have voluntarily implemented the legislation. Compulsory arbitration in other districts during the test period, and in all districts after the test period, would be a matter of local option, with each district determining, by local rule in accordance with the provisions of the bill, whether to authorize arbitration.[1]

B. Cases subject to mandatory arbitration

The bill would provide for arbitration only in certain categories of litigation:

(1) Any action in which the parties consent to arbitration and the relief sought consists only of money damages, regardless of amount.

(2) Any of the following four kinds of actions if those actions involve only monetary claims not exceeding $50,000, exclusive of interest and costs, or involve such claims plus additional non-monetary claims which are found to be "insubstantial": (*a*) actions under Section 2 of the Miller Act (claims for labor and material on performance bonds for United States public buildings or works), where the United States has no monetary interest in the claim; (*b*) actions under the Jones Act (for death or injury to seamen); (*c*) actions in which jurisdiction rests on a federal question or diversity and the claim is based on a negotiable instrument or a contract; and (*d*) actions in which there is diversity or admiralty jurisdiction and the claim is "for personal injury or property damage."

(3) Actions to which the United States (including an agency, department, officer or employee in an official capacity) is a party and which are designated in a regulation to be promulgated by the Attorney General within 120 days after enactment of the bill.

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[1] At least one federal district court has adopted by local rule, on a 1-year experimental basis, an "arbitration program" almost identical to that contained in the proposed legislation, and two other districts are about to follow suit. Local Civil Rule 49 was adopted by the Eastern District of Pennsylvania on Feb. 1, 1978, and similar rules are expected to be promulgated in April by the District of Connecticut and the Northern District of California. Although our Committee has not addressed the issue, we have reservations as to the authority of the district courts under Rule 83 of the Federal Rules of Civil Procedure to adopt local rules which contemplate such "basic procedural innovations". *Compare Miner* v. *Atlass*, 363 U.S. 641, 650 (1960), *with Colgrove* v. *Battin*, 413 U.S. 149, 163–64 n.23 (1973). See generally 12 Wright & Miller, *Federal Practice and Procedure* ¶ 3152 (1973); 7 Moore, *Federal Practice* ¶ 83.03 (1974).

If a case meets the jurisdictional criteria and no party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the action must be referred to arbitration. However, as explained in greater detail below, within 20 days after the arbitrators issue their award any party may demand a trial de novo in the district court.

C. The arbitrators

Unless the parties jointly designate arbitrators of their own choosing within seven days after the action is referred to arbitration, a tribunal of three arbitrators (or just one if the parties so agree) is selected at random from among persons certified by the Chief Judge of the district. To be eligible as an arbitrator, an individual must be a lawyer who has been admitted to practice in a state or territory for at least 5 years, is a member of the bar of the certifying district court and has been certified as competent by the court. Once certified, an arbitrator remains eligible to serve for a period of four years unless his certification is first withdrawn by "a majority of the active judges of the court."

An arbitrator is entitled to a fee not to exceed $50 for each case in which he serves plus reimbursement for his expenses, not including office space. These fees and expenses are payable by the United States, subject to reimbursement by a party in some instances as discussed below.

An arbitrator may not be a full-time government employee. Nor may he, or any partner or associate, act as agent or attorney for any party in a matter in which he participated as an arbitrator. Arbitrators are subject to disqualification for bias or prejudice in the same manner as judges under Sections 144 and 455 of Title 28.

D. Procedures before, during and after the arbitration

The parties are entitled to all forms of pretrial discovery during a limited period before arbitration. Unless a dispositive motion is pending, any case in which only monetary relief is sought is referred to arbitration as soon as discovery has been completed or 120 days after the answer has been filed, whichever occurs earlier. Cases seeking additional relief are to be referred to arbitration within 120 days after a determination by a district judge that the nonmonetary relief sought is "insubstantial." The arbitration hearing must begin not later than 30 days after the reference, it must be concluded "promptly," and the award must be filed with the court "promptly" after the hearing has been completed.

The attendance of witnesses and the production of documents at the arbitration hearing can be required in accordance with Rule 45 of the Federal Rules of Civil Procedure. Arbitrators under the bill are empowered to administer oaths and affirmations. The Federal Rules of Evidence "may be used as guides" concerning the admissibility of evidence, but any relevant evidence that is not privileged may be admitted. A party is entitled to a tape recording or transcript of the arbitration hearing, but if he procures a copy, he does so at his own expense and must also furnish copies to the other parties without charge.

Any party may demand a trial de novo in the district court within 20 days after the arbitration award has been filed. If such a demand is made, the action will be treated for all purposes as if it has not been referred to arbitration. If a de novo trial is not timely requested, the arbitration award will be entered as a judgment of the court, subject to the same provisions of law and having the same force and effect as a judgment in a civil action except that it will not be subject to appeal.

If a trial de novo takes place, no evidence may be admitted concerning the prior arbitration, the nature or amount of the award, or any other matter concerning the conduct of the arbitration. However, testimony given at the arbitration hearing may be used for impeachment at the de novo trial. If the party who demanded a trial de novo obtains a "more favorable" judgment than the arbitration award, he is not liable for any costs of the arbitration proceedings. However, if he does not obtain a judgment more favorable than the award, he will be assessed "the costs of the arbitration proceeding," including the fees and expenses of the arbitrators and interest (the rate for which is not specified) on the arbitration award from the time it was filed. A plaintiff pays such interest into court; a defendant pays it to the plaintiff.

The bill authorizes the Judicial Conference of the United States to develop model procedures for the conduct of arbitration proceedings and directs the

Federal Judicial Center to advise and consult with the Judicial Conference and the district courts in connection with their duties under the Act.

GENERAL DISCUSSION

We believe that the proposed legislation is deficient both in concept and in content and that its adoption would be ill-advised.

As a preliminary matter, we are puzzled by the fact that the Department of Justice, which drafted and sponsored the bill, apparently has not even estimated the number of cases to which the compulsory arbitration program would apply in the federal courts. In transmitting the proposed legislation to the Speaker of the House and the President of the Senate, the Attorney General explained that "no information is available * * * on the portion of these cases [for which the bill would require arbitration] that seek only money damages and that claim no more than $50,000 in damages." It seems odd, to say the least, that The Department of Justice, after spending substantial attention to the study and drafting of this legislation, has not engaged in any statistical sampling in order to estimate the probable number of cases affected by the legislation. (We note that such sampling would not be difficult. For example, in the Southern District of New York plaintiffs commencing litigation are required to complete an information statement which indicates the dollar amount of monetary relief sought and identifies other types of relief being sought.)

Equally surprising is the Department's silence concerning a major category of cases selected for arbitration—litigation in which the Government is a party. The bill provides that the Attorney General may by regulation designate as subject to compulsory arbitration any civil action in which the United States (including an agency or individual acting in an official capacity) is a party. This category is potentially extremely broad: there is no monetary limit on the relief sought, nor is there any requirement that non-monetary relief be "insubstantial."[2] Yet, in transmitting the bill to Congress the Department of Justice has given no indication of what cases, either by subject or by amount or form of relief sought, it would designate for arbitration under its own proposed legislation, reserving such disclosure until it promulgates regulations following enactment of the bill. Presumably, at least in cases in which the United States is a party, the Department of Justice now has available information which would be useful to Congress in evaluating the applicability and advisability of the bill.

There are, of course, a number of kinds of cases to which the United States is a party but which might be considered to involve considerations not present in litigation between private parties. For example, civil forfeiture actions, tax litigation and condemnation actions are not comparable to other types of litigation and therefore arguably should not automatically be referred to arbitration. On the other hand, since many civil cases in which the United States is a party may involve claims under $10,000, they may be especially suited to the proposed mandatory arbitration procedure.[3]

In any event, before considering the bill Congress should know what types of civil litigation to which the United States is a party the Attorney General considers appropriately referable to arbitration. Certainly it would be anomalous if the Attorney General's regulation excluded from arbitration litigation comparable in most respects to private claims that would be the subject of mandatory arbitration. Such kinds of cases would include claims for personal injury or property damage under the Federal Tort Claims Act, litigation under federal contracts and suits involving federal negotiable instruments.

In addition to the serious question of enacting this legislation in the absence of any estimate of the number of cases to which it would apply (both because of the absence of statistical data and because the cases in which the United States is a party have not been specified), we have substantial doubts as to the wisdom of imposing this type of arbitration scheme in federal civil litigation.

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[2] The Attorney General's letter transmitting the proposed bill to Congress implies an intent to do no more than permit the Attorney General o exclude cases which otherwise would be subject to mandatory arbitration. Perhaps, therefore, the $50,000 monetary limit and requirement of only insubstantial non-monetary claims were intended to apply, and it is only the drafting which is at fault.

[3] The only cases involving claims under $10,000 potentially subject to arbitration in which the United States is not a real party at interest are Miller Act claims and admiralty actions for personal injury or property damage.

We note initially, as the Attorney General himself acknowledges, that although the proposed legislation is patterned on arbitration procedures which have been adopted in a number of states, no such state procedure has involved claims in excess of $10,000, and most have involved maximum claims of far smaller size. The proposed federal program, by comparison, would involve claims starting at $10,000 in most instances and going as high as $50,000.

Obviously, the proposed legislation will fail to the extent that litigants do not accept an arbitration award as final, but instead insist on a trial de novo, thereby adding the expense and delay of the arbitration process to the burdens of the litigants and the judicial system. It is well recognized that the greater the sum at stake, the more likely it is that an unsatisfied litigant will seek another trial. One study of the experience under the mandatory arbitration procedure in Pennsylvania has shown that the rate of new trials was dramatically higher (by a factor of more than 40 percent) in cases involving claims over only $1,000 than it was in cases involving smaller claims. See Note, *Arbitration and Award*, 113 U. Pa. L. Rev. 1117 (1965). Other commentators agree that the higher the claims, the more likely it is that the litigants will demand new trials. See, *e.g.*, Rosenberg & Schubin, *Trial by Lawyers: Compulsory Arbitration of Small Claims in Pennsylvania*, 61 Harv. L. Rev. 448 (1961). We are concerned that despite even the "disincentives" (as to which we have other reservations) provided in the bill, demands for trials de novo will be so routine that the legislation will merely impose further burdens on the litigants and judicial system without compensating gains.

It is important to keep in mind that, except for the compulsory and non-binding state models from which this proposed legislation has been adapted, arbitration is generally understood to be a *voluntary* method of resolving disputes, one which is usually adopted by the parties prior to a controversy as part of a contractual relationship or which, less frequently, is agreed to as a means of resolution after a dispute has arisen. Equally important, arbitration has been generally recognized as a *final* and binding dispute determination, usually not subject to appeal, much less to retrial. Confidence in private arbitration obviously derives in large measure from past experience based on the voluntary and final nature of the procedures involved. Other factors often make such voluntary final arbitration desirable: the panel of arbitrators may have special expertise, expensive pretrial discovery may be curtailed or eliminated, doubts as to several possible forums may be eliminated, confidentiality may be maintained, continuing business relationships may be fostered, and so on. The mandatory procedure contained in the proposed legislation has few if any of these advantages or benefits. Public confidence in a compulsory scheme of arbitration between litigants who have not voluntarily selected arbitration and for whom it is non-binding is thus questionable.[4]

Although limited pre-trial discovery is occasionally permitted in private arbitration, that is the exception rather than the rule. Here again, private arbitration differs from the scheme of this bill. The bill would allow quite substantial discovery prior to a reference to arbitration. Since the parties have up to 120 days for discovery after the defendant's answer is filed, each side could propound at least two successive waves of interrogatories and requests for document production and could conduct extensive depositions. Although it is unlikely that truly massive discovery will be taken prior to arbitration in cases involving alleged damages of $50,000 or less, it seems clear that the bill would permit, if not encourage, substantial pre-arbitration discovery. Thus, litigants are not likely to find that the arbitration required by the bill has substantially reduced one of the major costs of federal litigation—pretrial discovery.

Even if the parties accept the arbitrators' determination, the only benefit to litigants will be the possible avoidance of delay before a case reaches the trial

[4] The non-binding nature of the federal arbitrator's award is, of course, constitutionally required under the Seventh Amendment in cases where a litigant would have been entitled to a jury trial, and probably constitutionally required pursuant to the due process clause at least in cases involving diversity jurisdiction. (It would seem anomalous, to say the least, to enable a litigant by bringing an action in or removing it to a federal court to avoid a trial which he would have been entitled to had the action remained in state court.) There may, perhaps, be a residuum of federal question or admiralty jurisdiction cases where there is no right to trial by jury to which a compulsory and binding scheme of arbitration could be applied, but that question is obviously not contemplated in this bill and therefore we do not consider the constitutional implications of such a proposal further.

calendar and the somewhat shorter hearing time and less expensive preparation for an informal arbitration hearing as compared to a formal trial. However, in cases involving less than $50,000, we would expect that the cost of preparing for and conducting a formal trial would usually not be substantially more costly than the expenses incurred in arbitration. On the other hand, if the arbitrators' award is not accepted by one of the parties, then the ultimate trial of the action will have been delayed by several months and the cost to litigants of conducting the arbitration proceedings will have added substantially to the expenses of litigation.

In an attempt to deter litigants from insisting on their day in court, the bill provides "disincentives" to such action. If a litigant demands a trial de novo and does not obtain a judgment more favorable than the arbitration award, he is required to pay the arbitration "costs," which are defined to include not only the arbitrators' fees and expenses, but also interest on the arbitration award. Since the arbitrators' expenses for secretarial assistance, telephone, postage and the like will usually be rather small, and since their fees will not aggregate more than $150, the proposed disincentives will seldom be significant. For the losing defendant who in any event would usually have to pay interest from the time the claim arose (or at least from the time the suit was filed), the statutory requirement that he continue to pay interest as the price of a new trial is a non-existent cost. Even for the losing plaintiff the impact of the interest penalty is likely to be minimal, since interest would rarely exceed $1,000.[5] Certainly, compared to the other costs in going forward to try an action, the disincentives in most cases would appear to be relatively nominal.[6]

Even apart from the constitutional problems raised by imposing disincentives on litigation and the right to trial by jury (problems which are probably not significant if we correctly interpret the bill), we believe that the proposed disincentives are inadvisable.

First, the perceived need for disincentives implies a perceived lack of acceptance of the arbitrators' award without them. If the award is not to be accepted for its own worth but only because of the "disincentives" of ignoring it, that indicates an inherent and unacceptable lack of confidence in the system. We are concerned that the right to a day in federal court should remain freely available to *all* litigants whose claims satisfy the jurisdictional requisites. The proposed legislation might well be viewed, however, as discriminating against litigants with smaller claims, even though a claim in excess of $10,000 is to most individual litigants a substantial and important matter. If delay in obtaining a trial is perceived to be a problem, we suggest that the appropriate solution may be not to compel arbitration, but to establish means to better supervise the progress of smaller claims and bring them to trial or to settlement more speedily.

We note also that legislation is pending to eliminate diversity jurisdiction and that a number of projects are under way to consider means of shortening and reducing the expense of pre-trial discovery. These proposals may themselves greatly reduce the perceived need for this arbitration scheme. See, *e.g.*, H.R. 9123, 95th Cong., 1st Sess. (1977).

Of course, in those cases in which both litigants consent to arbitration in the form provided for in the bill, we believe that the legislation may have a salutary effect. If both sides feel that they have something to gain, they are more likely to use the procedure well and to accept the result as final. (Indeed we wonder why provision is not made for binding arbitration where the parties so desire.) But where one side does not desire arbitration and is nevertheless compelled to go through the process simply to obtain the trial that he would be otherwise entitled to, the system will be prone to abuse and is certainly likely to be unpopular.

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[5] For example, at a 6 percent rate, a delay of 4 months on a zero judgment after a trial de novo following a $50,000 award would entail a $1,000 interest "cost" for plaintiff. If the delay or the difference between award and judgment were less, the interest would also be less.

[6] We assume that the proponents of the bill do not intend "costs" to include expenses for travel by witnesses attending an arbitration hearing, although these costs would be taxable to the loser at the trial. If such costs were intended to be included, they might well become so substantial as to raise questions as to the constitutionality of the bill in cases where payment of such costs is a prerequisite to a trial by jury. The bill also raises questions concerning who bears the additional costs where a lawyer acts on a contingent fee basis. Usually, costs may not properly be incurred by counsel unless a client agrees to be ultimately responsible for them. See D.R. 5-103B.

For example, a plaintiff who does not wish arbitration, either because he expects that the arbitrator will not find in his favor or because he assumes that if the arbitrator finds in his favor the defendant will automatically demand a trial de novo, may make only a pro forma showing at an arbitration. (If he does poorly enough, he is likely to do better at trial and thus would not even be charged for the costs of the arbitration.) Perhaps even more likely is the tactic that can be expected of defendants. A defendant who is convinced that the plaintiff will not accept a small or zero award from the arbitrator may participate in the arbitration but put on little or no affirmative case. Such a tactic would give him the benefit of effective discovery of the plaintiff's case (assuming the plaintiff does not perceive the gambit), and at less expense than would have been incurred if defendant had taken depositions or propounded interrogatories in advance of the arbitration. If the arbitrator finds for defendant, all well and good; if not, defendant need only pay nominal arbitrators' fees and expenses and interest he probably would have had to pay in any event.

The bill is particularly subject to unfairness or abuse when one of the litigants or a crucial witness resides far from the district or when an important witness will charge a substantial fee to give expert testimony. In such cases, the litigant must either go to the burden and expense of coming or bringing his witness to the forum for the arbitration hearing, or bear the substantial risk that the arbitrators' award will be disappointing. If the litigant meets that burden and receives a favorable award, his opponent may well demand a trial de novo, making the arbitration a costly nullity.

Because there will undoubtedly be such cases in the federal courts for which non-binding arbitration is manifestly inappropriate, we believe that the proposed legislation is seriously flawed by its failure to provide any discretion in the trial court to excuse a party from the necessity of going to arbitration. Where both parties wish to avoid arbitration or where one party has a compelling reason for doing so, we believe that it makes little sense to require them to go through what will in all likelihood be a pro forma exercise or perhaps a mere charade.

In summary, we believe that the bill is ill-advised and will neither reduce the expenses or delays for litigants nor save the federal judicial system sufficient time and expense to warrant its enactment. On the contrary, we believe that trials de novo will be demanded frequently and, as a result, the arbitration process will be subject to abuse and will simply become another time-consuming and expensive layer of federal litigation. We suspect that the scheme will be perceived as discriminatory in curtailing access of litigants with smaller claims to the federal courts and will do little to relieve court calendars congested as a result of the larger cases and criminal prosecutions which occupy extended judicial manpower and court facilities. We believe that a more actively pursued program of settlement conferences before magistrates and judges who will not try those actions might have an equally beneficial result in promptly settling cases without the need for expensive discovery, a hearing, and then a trial de novo.

A more detailed, supplemental examination of the provisions of the bill follows.

DETAILED ANALYSIS OF THE BILL AND SUPPLEMENTAL COMMENTARY

Section 641 of the proposed legislation provides that each district may adopt the use of arbitration by passing a local rule in accordance with the provisions of this chapter.[7] As previously noted, such "local option" is apparently partially superseded by Section 5 of the bill, which provides for the mandatory adoption of the arbitration scheme in five to eight districts selected by the Chief Justice, after consultation with the Attorney General, for a three-year experimental period. Moreover, the "local option" would not allow districts to adopt by local rule an arbitration scheme which even slightly modified the procedure required by this legislation. For example, it apparently would not be possible for a district to pass a local rule giving judges discretion to determine whether the parties could by-pass compulsory arbitration in special circumstances. Similarly, the time limits required by the bill for completion of discovery, reference to

[7] Reference to sections 641–49 are to proposed new sections of title 28. They are all contained in section 3(a) of the bill itself.

arbitration and commencement of arbitration do not seem subject to alteration by local rule in any circumstances.

Under section 642 of the proposed legislation, arbitrators are certified for a four-year term unless the certification is sooner withdrawn by a majority of the active judges of the court.[8] We believe that this provision is unworkable and inadvisable.

Since arbitrators are to be randomly selected from the list of lawyers who have been certified, there will be no way, short of decertification, of preventing a person from acting as an arbitrator. Action by a majority of the active judges of a large court (such as the Southern District of New York, the Northern District of Illinois or the Central District of California) seems far too cumbersome a method of removing an arbitrator who has been criticized for his conduct of arbitration hearings or who has in other ways demonstrated his unsuitability for the position. It might also be too embarrassing a procedure and thus discourage volunteer arbitrators.

Unfortunately, we see no easy solution to the problem of removing unsatisfactory arbitrators. Because of the governmental nature of the appointment, it will be difficult to use discretion and privacy in screening applicants in the first instance and even more difficult to remove an appointed arbitrator from a panel. We doubt that many litigants will come forward in a formal manner publicly to criticize an arbitrator for his conduct at hearings. Moreover, an arbitrator subject to decertification proceedings might insist on a due process hearing in an effort to avoid suffering a perceived injury to his professional reputation and career. Private entities, such as the American Arbitration Association, which need not conform to due process or "sunshine" requirements when removing potential arbitrators from selection lists, can act more flexibly in avoiding the appointment of, or in effectively removing from the panel of arbitrators, persons who have been justly criticized as unqualified.

Proposed section 643 provides that arbitrators will be compensated for their services by a fee determined by the district court "not to exceed $50 for each case in which they serve." It would be rare to find a lawyer five years or more in practice whose time charges are less than $50 per hour and rarer still to find a federal case in which the arbitrator will be able to complete his work—from reading the pleadings, hearing the parties and consulting with his fellow arbitrators, to reaching an award and drafting it—in less than several hours. It is therefore obvious that a $50 per case fee is in the nature of an honorarium rather than meaningful compensation. Arbitrators volunteering to serve for such compensation obviously will be performing their duties not for the money, but as a pro bono matter. Accordingly, to suggest that an arbitrator's compensation is "not to exceed $50"—and may even be less—is insulting and implies the necessity that an arbitrator prepare an application setting forth why he is entitled to the maximum fee.

There is reason to wonder, moreover, whether such modest compensation will attract sufficient arbitrators of the proper caliber to serve on cases of the kind likely to be presented.[9] If hearings are protracted, service as an arbitrator by an active attorney could become a costly matter. The bill makes no provision for higher fees in protracted cases, and 18 U.S.C. § 207 precludes the parties even from agreeing to pay such additional compensation. We are also concerned that lawyers who volunteer to serve as federal arbitrators may view that service as a substitute for pro bono services which they now undertake, such as representation of indigents. If so, to some extent the bill may compete with other pro bono activities in which lawyers traditionally engage and which may be more valuable to society than the arbitration procedure contemplated by the bill.

Proposed section 643 also provides that arbitrators shall be reimbursed for actual expenses (not including procurement of office space) necessarily incurred, with the maximum rate of such compensation to be set by regulation. Two comments may be made. First, such expenses become a portion of the "costs" which must be paid by a litigant demanding a trial de novo who does not improve on the award. In that respect, if such costs are substantial, then

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[8] Although the bill does not so provide, presumably certification will be voluntary and a panel member may resign prior to the expiration of his four-year term.

[9] An internal Justice Department memorandum concerning compulsory arbitration observes that "competitive wages will have to be paid to attract qualified personnel" for "cases arbitrated on the federal level."

concomitantly, so are the "disincentives" to a trial de novo. Second, and more likely, if the rates of compensation established by the federal government are set at unrealistically low levels or disbursed begrudgingly, it would further discourage participation by attorneys who could not afford to underwrite the true cost of their services, particularly out-of-pocket items.

As previously noted, proposed section 644 defines the cases which would be subject to mandatory arbitration. The language of the section raises a number of questions.

The language concerning the jurisdictional maximum of $50,000, for example, seems simple enough but offers a potential avenue for abuse. A party who wishes to avoid arbitration will have substantial leeway in many types of action to allege monetary claims that exceed $50,000—*e.g.*, for pain and suffering, speculative consequential damages, or punitive damages—and thus could side-step the mandatory arbitration procedure by asserting claims he realistically knows have no change of success.[10] It is perhaps anomalous that a plaintiff who claims $55,000 and at formal trial proves damages of only $5,000 pays no penalty whereas the plaintiff who alleges $25,000 damages, receives an award of $20,000 and on a trial de novo does no better must pay costs to have his day in court.

Another question unanswered by the drafting of the bill is whether claims, counterclaims, cross-claims and third party claims are to be aggregated in determining whether a case is referable to arbitration. One assumes that use of the term "relief sought" implies that each claim for relief is to be considered, not only the complaint. However, the correctness of that assumption is not entirely clear, and it is even less clear what is intended when the claim, the counterclaim, the third-party claim and the cross-claim do not individually exceed $50,000, but in the aggregate they do. Other questions will doubtless arise, such as whether claims in the alternative are to be aggregated.[11]

Apart from the bill's lack of specificity as to the cases that will be referred to arbitration when the United States is a party, there would appear to be other anomalies in the selection of cases for reference to arbitration. Thus, Jones Act claims are referable, but FELA actions apparently are not. Similarly, although contract and negotiable instrument actions under federal question and diversity jurisdiction are subject to arbitration, personal injury or property damage cases are referable only if they arise under diversity or admiralty jurisdiction and not federal question jurisdiction. It is difficult to understand why, for example, a diversity action for violation of a state safety standard resulting in an injury to person or property is referable to arbitration whereas an action brought under a federal safety law would not be. Moreover, if, as we assume, injury to property is intended to apply broadly to tortious conduct involving monetary loss, why should an action for violation of a state securities law or common law fraud be referable to arbitration brought as a diversity case, while an action for similar violation of Rule 10b–5 would not?

Proposed section 645 sets forth the timetable for references to arbitration. If a case involves a claim for non-monetary relief, it is referable to arbitration only upon a determination by a court that such non-monetary claims are "insubstantial," after which the clerk within 120 days shall refer the case to arbitration. This provision raises two questions. First, a determination of insubstantiality may not be made until long after a case is filed. At such a late date, reference to arbitration, even if the award is allowed to become final, will not avoid much delay. Second, such a determination may be difficult to make. No standard of determination or guidelines are provided by the bill. Is there to be a hearing? Are only the pleadings to be considered? These and similar questions should not be left unanswered.

The time schedule under Section 645 of the proposed legislation for reference of cases to arbitration raises several other serious questions.

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[10] Local Civil Rule 49 adopted by the Eastern District of Pennsylvania on February 1, 1978, purports to deal with this problem by specifying that, for purposes of determining whether an action should be referred to arbitration, "damages shall be presumed in all cases to be less than $50,000" unless counsel for the claimant files a certificate stating that "to the best of his knowledge and belief * * * damages recoverable exceed * * * $50,000." This provision, however, adds little if anything to Rule 11 of the Federal Rules of Civil Procedure.

[11] Thus, truly separate claims should perhaps be aggregated, but a claim merely for indemnification or contribution perhaps should not. Other debatable situations can be foreseen.

First, the bill contains a potential trap for the unwary. If after the answer is filed both sides allow 20 days to go by without initiating discovery or filing a dispositive motion, the case will automatically be referred to arbitration. (The bill makes no provision for third party practice. In this example, the case would be referred to arbitration before a third party pleaded at all.) At that point, further discovery is not possible and the arbitration must go forward. Thus, through inadvertence, the case may have to go through the entire arbitral process without discovery even though the drafters of the bill consider that an opportunity for discovery may be necessary in order to make arbitration acceptable to the parties.

Second, the bill is silent as to the consequences which follow from time lost on discovery motion practice. If one party objects to discovery, thus requiring the other to move to compel it and the magistrate or court delays decision of that motion, the 120-day period may expire, leaving a party substantially deprived of discovery when the case is referred to arbitration. It would seem to make little sense to require a party to go forward with arbitration until he has obtained the discovery to which he is entitled and which he has sought in a timely manner. It should also be noted that a bottleneck in the first round of discovery may preclude a party from getting subsequent discovery which he learns is necessary only after obtaining the information sought in his first round.[12]

Finally, a party cannot await the result of a dispositive motion before deciding whether to seek discovery. Again, this may encourage unnecessary and expensive discovery practice. Thus, ironically, discovery may become more costly as a result of the time limit and lack of other limitations contained in the bill. We believe, therefore, that discovery prior to arbitration should instead be carefully restricted but flexibly administered. This would seem consistent with the intent of the bill, because if a party demands a trial de novo, the case is to be treated for all purposes as if it had not been referred to arbitration, and presumably further discovery may be pursued before trial. Consequently, we suggest that any bill of this kind should provide a procedure pursuant to which the scope of pre-arbitration discovery can be circumscribed or modified by the district court or magistrate following an initial "pre-trial" conference.

Proposed section 645(b) provides that the arbitration will be conducted before a panel of three arbitrators unless the parties agree on a single arbitrator and that the parties may agree on their own arbitrator(s) but that if they do not do so within seven days after the action has been referred to arbitration, the clerk shall choose the arbitrator(s) from the certified panel by a random process. We believe that the seven-day limit to notify the clerk that the parties have chosen arbitrators seems too short, especially since the notice of reference will probably be mailed to the parties. We believe that if the parties can agree upon their own arbitrators, they will be far more likely to accept the result than one handed down by arbitrators picked by the clerk, and that selection of arbitrators by consent is therefore to be encouraged. Thus, we would suggest that if the parties agree upon their own arbitrators at any time prior to the hearing, their choices should be confirmed.

Proposed section 646 provides that the arbitration hearing shall commence not later than 30 days after the action is referred to arbitration and shall be concluded promptly. This does not seem objectionable in principle, but we have some concern that it may prove too inflexible in governing the commencement of the hearing or the later proceedings. It may well be that illness or commitments of one or more designated arbitrators or parties will prevent strict adherence to statutory requirements, and therefore some form of latitude, perhaps by court order, should be provided.

Subsection (b) of section 646 provides that Rule 45 of the Federal Rules of Civil Procedure shall govern the issuance of subpoenas for the attendance of witnesses and the production of documentary evidence. Although we find this reasonable, we note the burden it places on witnesses, particularly those who are not interested in the case, to attend what may be an extra proceeding. Also, it is not clear from the language of the bill whether objections to a subpoena should be determined in the first instance by the arbitrator or the court. This should be clarified.

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[12] A corollary, also resulting from the requirement that discovery be completed within 120 days, is that in certain instances parties may demand more discovery than they actually need because they recognize they will not have the opportunity to follow up in sequential fashion.

Subsection (d) of section 646 provides that a party may have a recording or transcript made of the hearing, but if he does so, he must furnish a copy without charge to any other party. The section leaves a question open: must a party elect to record or transcribe the entire proceeding or may he elect to transcribe only his opponent's case or portions of it? Moreover, we see no basis for requiring the party who makes the recording or transcript to furnish a copy free to the opposing side. Such a rule will simply lead to a game of bluff in which each side waits for the other to indicate first that a transcript will be made.

Proposed section 647 requires that the arbitrators' award be filed with the court "promptly after the hearing is concluded" and provides that it shall be entered as a judgment of the court unless a trial de novo is timely requested. The judgment so entered is to have the same force and effect as a judgment of a court in a civil action except that it is not subject to appeal. We note that this leaves awards subject to vacatur under Rule 60(b) of the Federal Rules of Civil Procedure, and hence arbitration awards may not be as final as they initially appear.

The bill does not state whether the arbitrators are expected to render a decision embodying their reasoning, findings and conclusions. The practice of giving a reasoned decision would more closely approximate what a federal court is expected to do. On the other hand, in many forms of private arbitration—for example under the Commercial Arbitration Rules of the American Arbitration Association—arbitrators are actively discouraged from rendering any decision explaining their award. Rather, they are encouraged simply to state, without explanation, the relief granted.

Proposed section 647 may imply the latter practice insofar as it suggests that the award would be in a form that would permit its entry as a judgment. Pursuant to Fed. R. Civ. P. 54(a), judgments are not to contain a recital of the pleadings, the report of a master or the record of prior proceedings. They are clearly distinct from findings and conclusions, Fed. R. Civ. P. 52(a), 58. We believe that it would be advisable to establish a uniform practice as to whether the arbitrators will render a reasoned decision, whether orally or in writing, as part of their function. There are arguments in favor of both positions which ought to be resolved. On the one hand, rendering of a reasoned decision is likely to have a persuasive effect. If the losing party accepts the arbitrators' reasoning, he will be less likely to insist upon a trial de novo than if he had no basis for understanding the award. On the other hand, the need to render a decision adds to the burdens of the arbitrator and in some cases may encourage a party to seek a trial de novo where he disagrees with the arbitrators' reasoning.

Section 648 deals with the trial de novo. Subsection (a) provides that it may be obtained by any party who so demands within 20 days after the filing of the arbitration award. The provision that *any* party may request a trial de novo is straightforward in concept except in multi-party litigation.[12a] For example, it is not clear what result would follow if an award were rendered jointly and severally against two defendants but only one defendant demanded a trial de novo. Would the award become a final judgment against the non-demanding party? There would seem no reason to avoid finality unless issues of indemnification or contribution were involved. The collateral estoppel effects of a final award may also be a consideration to litigants. It is not clear whether such effect is intended by the drafters. Describing a final award as a judgment so suggests, although awards in private arbitration usually do not have collateral estoppel effect.

Subsection (b) of section 648 provides that if a trial de novo is sought, the action shall be treated for all purposes as if it had not been referred to arbitration. However, this subsection is qualified by the succeeding two, which provide that testimony given at the arbitration can be used for impeachment purposes and for the imposition of costs of arbitration if the judgment is not more favorable than the arbitration award. The limitation in subsection (c) of section 648 to use of testimony for purposes of impeachment seems to us pointless. If, for example, a party has made an admission against interest at the arbitration, there would appear to be no reason whatever not to permit its use at the trial as substantive evidence. The real question, however, is whether there should not be a total privilege over the use of testimony at the arbitration hearing in any subsequent trial de novo. Such a rule would, for one thing, discourage litigants

[12a] It is at least theoretically subject to abuse. A party might demand a new trial principally for harassment, although this would be infrequent.

from going to the expense of ordering a transcript of the arbitration proceeding, which could be a substantial expense. It should also be noted that if a transcript of the arbitration proceedings is made, it would be available in collateral litigation involving other parties. This fact could have significance in unusual circumstances in which there might be related cases in litigation.

CONCLUSION

Although very much aware that increasingly congested court dockets and escalating litigation delays and costs create major problems for both the judiciary and smaller claimants, we believe that adoption of the proposed legislation will not alleviate those problems. To the contrary, the non-binding mandatory arbitration contemplated by the bill may well exacerbate and compound the existing difficulties by forcing the parties to participate in a costly and time-consuming additional proceeding which in many instances will be a complete nullity. Remedial surgery on the defectively drafted provisions will not, in our opinion, rectify the inherent flaws in the proposal, and we therefore urge Congress to disapprove the bill.

Dated: New York, New York, March 1978.

Respectfully submitted,

Bernard W. Nussbaum, *Chairman*

Elkan Abramowitz
Steven M. Barna
Paul Bernstein
Michael A. Cooper
Sheldon H. Elsen
George J. Grumbach, Jr.[13]
Clark J. Gurney
Jacob Imberman
Lewis A. Kaplan
John J. Kirby, Jr.
Daniel F. Kolb
Michael Lesch
Edwin McAmis
Standish F. Medina, Jr.[13]
Murray Mogel
Burt Neuborne
Otto G. Obermaier
Lawrence B. Pedowitz
Renee J. Roberts
Honorable Sol Schreiber
Edward M. Shaw

[Additional material submitted by Robert Coulson: Bylaws of the American Arbitration Association, Inc., and description of National Construction Industry Arbitration System follows:]

AMERICAN ARBITRATION ASSOCIATION, INC., BY-LAWS AS AMENDED THROUGH MARCH 1976

ARTICLE I—NAME, LOCATION AND INSIGNIA

1. The name of this organization shall be the American Arbitration Association, Inc., incorporated under the Not-For-Profit Corporation Law of the State of New York.

2. Offices of the Association shall be located in New York and/or in such other localities as may be determined by the Board of Directors.

3. The seal of the Association shall include the letters "AAA" in such design as may be approved by the Board of Directors.

4. The Association may adopt any insignia in such design as may be approved by the Board of Directors.

ARTICLE II—PURPOSES

1. The objectives of the Association are, for the benefit and education of the general public and interested parties, to study, research, promote, establish and administer procedures for the resolution of disputes of all kinds through the use of arbitration, mediation, concilliation, negotiation, democratic elections and other voluntary procedures, together with such other objects and purposes as are set forth in the certificate of incorporation as consolidated and amended.

2. The Association shall not pay dividends or distribute any part of its income or profit to its members, directors or officers. Compensation in a reasonable amount may be paid to members, directors or officers for services rendered.

[13] Subcommittee member.

3. No substantial part of the activities of the Association may be devoted to influencing legislation.

ARTICLE III—MEETINGS OF THE ASSOCIATION

1. The Annual Meeting of the members of the Association for the election of officers and directors and the transaction of any other business relating to the affairs of the Association shall be held at such place and on such dates as may be determined by the Board of Directors.

2. Special meetings of the members may be called by the President, or by resolution of the Board of Directors or Executive Committee, and shall be called upon written petition of any twenty-five (25) members, such petition to be filed with the President.

3. Notice of the time and place of the meeting, or any adjournment thereof, shall be mailed or delivered to the last recorded address of each member, or, in lieu thereof, shall be published in a newspaper to be designated by the President, such mailing, delivery or publication to be made not less than ten days nor more than thirty days prior to the date of such meeting.

4. One hundred members of the Association, present in person or by proxy, shall constitute a quorum at the annual or any special meeting and a vote of the majority thereof shall be effective.

ARTICLE IV—MEMBERSHIP AND CONTRIBUTIONS

1. Annual Members: Any person, firm, corporation or association interested in the goals and purposes of the Association shall be eligible to annual membership, subject to such qualifications and procedures as the Board of Directors may prescribe. An annual member shall pay such dues as may from time to time be established by the Board of Directors for the respective classification of annual members to which such member belongs and shall be entitled to the privileges of the Association as determined for such class.

Any firm, corporation or association which is a member in good standing is entitled to designate a representative thereof to exercise the privileges of such membership. Any member failing to pay dues within ninety (90) days from the date they become payable, may, after notice thereof, be either suspended or dropped from membership. Each member in good standing shall be entitled to cast one vote for the election of each of the Directors as hereinafter provided and on such questions as may be submitted to the members from time to time. Any member entitled to vote at any meeting may cast such vote by proxy.

2. Contributions: Any person, firm, corporation, association or foundation or other organization interested in advancing the Association's goals and purposes may offer grants or contributions to the Association for the purpose of appropriate research or education, without necessarily becoming a member of the Association. However, upon the contributor's application any appropriate portion of such grant or contribution may be allocated as membership dues, whereupon such contributor shall enjoy all the privileges of such membership.

ARTICLE V—AFFILIATIONS

1. The Association may grant or accept affiliation with other appropriate organizations with mutual interests, upon such terms and conditions as the Board of Directors shall in each case approve.

ARTICLE VI—BOARD OF DIRECTORS

1. The Association shall be governed by a Board of Directors of not less than forty, whose number may be fixed by vote of the members at an annual meeting.

2. The Board shall be divided into four substantially equal classes. One fourth of the Board shall be elected at each annual meeting. Each class shall serve for four years. Vacancies occurring in any class of elected Directors may be filled through appointment for the unexpired term by the Board or by the members at the next annual meeting.

3. Candidates for the office of Director shall be nominated by a nominating Committee, to be appointed by the Board of Directors.

4. The Board of Directors shall meet for the purpose of electing the Officers and the Executive Committee of the Association immediately after the Annual

Meeting of the members of the Association. Other meetings of the Board of Directors shall be held at such times and places as may be fixed by the Chairman of the Board of Directors from time to time.

5. Special meetings of the Board of Directors may be called by order of the President or the Chairman of the Board, and shall be called either upon the written request of ten members of the Board or upon the written request of any twenty-five members of the Association in good standing, such requests to be filed with the Secretary.

6. Notice in writing of the time, place and purpose of each meeting of the Board of Directors shall be delivered personally or by mail to each Director at least three days prior to the time of holding such meeting, such notice, if by mail, to be addressed to each Director at his last known post office address as the same shall appear on the records of the Association. No business shall be transacted at a special meeting of the Board other than that set forth in the notice thereof.

7. Meetings of the Board of Directors may be held at any place, within or without the State of New York, designated in the notice of meeting. Any action required or permitted to be taken by the Board or any committee thereof may be taken without a meeting if all members of the Board or the committee consent in writing to the adoption of a resolution authorizing the action.

8. At any meeting of the Board of Directors a quorum for the transaction of business shall be at least five (5) members plus an additional member for every ten members (or fraction thereof) in excess of fifteen. The act of a majority of those voting shall be the act of the Board of Directors, provided that there is a quorum.

9. Any one or more members of the Board or any committee thereof may participate in a meeting of such Board or Committee by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time. Such participation shall constitute presence in person within the meaning of the By-Laws.

10. Any Director may be removed for cause by the affirmative vote of two thirds of the full membership of the Board or by a majority vote of the members of the Association.

ARTICLE VII—EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS

1. There shall be an Executive Committee of the Board of Directors, selected from among its members and hereinafter called the Executive Committee, which Committee shall function in conformity with these By-Laws and subject to any governing policy established by the Board of Directors. Such Committee may exercise any of the powers of the Board when the Board is not in session, except those specifically reserved to the Board or to the members by these By-Laws or the New York Not-For-Profit Corporation Law.

2. The Executive Committee shall be composed of the Chairman of the Board, the Chairman of the Executive Committee, the President, the Treasurer, and seventeen other members of the Board of Directors, each of whom shall be elected by the Board of Directors at its meeting following the annual meeting of the Association.

3. The Executive Committee shall meet monthly at least ten times a year, at any place, within or without the State of New York designated in the notice of meeting. In the absence of the Chairman of the Executive Committee, the Chairman of the Board or the President shall act as temporary Chairman.

4. The members of the Executive Committee shall not exceed twenty-one (21) and shall hold office at the pleasure of the Board or until their successors are elected. Seven members shall constitute a quorum of the Executive Committee, and a majority vote thereof shall be necessary for decisions. In the event that any vacancy shall occur in the Executive Committee either by death, resignation or inability to act of any member thereof, or otherwise, such vacancy may be filled by majority vote at any regular or special meeting of the Board of Directors.

ARTICLE VIII—OFFICERS

1. The Corporate officers of the Association shall consist of the following, who shall be elected annually by the Board of Directors at their first meeting following the annual meeting of members: The Chairman of the Board of Directors, and as many Vice Chairman as the Board may from time to time determine; Chair-

man of the Executive Committee; the President; the Executive Vice President, if any; the Treasurer; the Secretary; and the General Counsel. The Executive Vice President, Secretary, and General Counsel shall be elected only after consideration of the recommendations of the President.

2. Subject to the preceding paragraph, at every annual election candidates for all elective offices to be filled by the Association shall be placed in nomination by a Nominating Committee to be appointed by the Board of Directors, and other nominations for such offices may be made by any Director. A plurality of the votes of the Directors present shall elect each officer.

3. All corporate officers shall serve until their successors are elected, subject to the provisions of Section 5 hereof. If any office shall become vacant through death, removal, resignation, or disability, the vacancy shall be filled for the unexpired term by appointment made thereto by the Executive Committee.

4. Additional functional, regional or other operational or staff officers may be appointed by the President for such purposes and with such duties and powers as he may designate, except that such appointees shall not be corporate officers or exercise any power as such. They shall hold office at the discretion of the President.

5. Any corporate officer may be removed, either with or without cause, at any regular or special meeting of the Board of Directors, provided that not less than two thirds of the Directors of the Association present at such meeting vote in favor of this removal. The notice of such meeting, however, shall contain information that this item of business will be upon that meeting's agenda.

ARTICLE IX—DUTIES OF OFFICERS

1. The Chairman of the Board of Directors: The Chairman shall preside over meetings of the Board of Directors and shall serve as the Board's representative in consulting with and advising the President concerning the understanding and effectuation of policies formulated by the Board.

2. Chairman of Executive Committee: The Chairman shall preside over meetings of the Executive Committee and shall serve as the Executive Committee's representative in consulting with and advising the President concerning the understanding and effectuation of policies formulated by the Executive Committee.

3. President: The President shall be the full time chief executive officer of the Association and shall be primarily responsible for the planning, managing and administration of the Association's affairs and operations, consistent with policies formulated by the Board of Directors. In addition to the duties incident to the office, the President may exercise such other powers as may be conferred by the Board of Directors not inconsistent with these By-Laws, the certificate of incorporation or applicable statutes.

The President shall define the duties of the staff, supervise their performance, establish their titles and delegate those responsibilities of management that shall be in the best interest of the Association, subject to annual review of the Board of the overall organization structure. The President shall employ and may terminate the employment of members of the staff, other than elected officers, as required to carry on the work of the Association.

The President shall be an ex-officio member of all committees. The compensation and terms of employment of the President shall be fixed by the Board. The compensation and terms of employment of all other officers and employees of the Association shall be fixed by the President, subject to the approval of the Board.

4. Executive Vice President: The Executive Vice President shall serve as the general deputy to the President. In the event of the unavailability or disability of the President the Executive Vice President shall exercise the powers and authority of the President, unless the Executive Committee shall otherwise direct.

5. Treasurer: The Treasurer shall have general charge of all moneys received by the Association and shall be responsible for the deposit of its funds in the name of the Association in such bank or banks as may be approved. The Treasurer shall be ex-officio a member of the Budget, Finance and Organization Committee, and shall report to the Board of Directors and the Executive Committee on fiscal and budgetary matters.

The Treasurer, with the concurrence of the Board, may delegate specific parts of his duties and powers to any appropriate officer of the Association.

The Treasurer shall have overall responsibility for the disbursements of the funds of the Association within the limits established by the approved budget.

The Treasurer shall have no right, nor shall any director, or officer of the Association have the right, to borrow funds of the firm, association or other entity in which one or more of its directors or officers are directors or officers or hold a substantial financial interest.

6. Secretary. The Secretary shall have general charge of the records of the Association, shall attend meetings of the Association, the Board and the Executive Committee, and shall keep the Minutes thereof.

The Secretary, with the concurrence of the Board, may delegate specific parts of his duties and powers to any appropriate officer or employee of the Association.

7. General Counsel: The General Counsel is the legal adviser to the Association. The Office of General Counsel, in addition to providing general legal service to the Association, is responsible for all litigation and amicus activities of the Association, subject to approval of the Board.

8. Vice-Presidents: Any Vice-Presidents or functional, regional or other operational or staff officers shall have such duties and exercise such powers as shall be delegated to them from time to time by the President.

ARTICLE X—STANDING COMMITTEES

The Following Committees, and such other Committees as the Board of Directors may designate from time to time, shall be Standing Committees of the Association. The members thereof shall be appointed, and the respective Chairmen designated, by the Board. Standing Committee Chairmen shall be members of the Board of Directors.

1. Budget, Finance and Organization Committee, consisting of not less than five members. The Committee shall advise the President on the annual budget, general financial operations, administrative and organizational affairs of the Association, and shall prepare recommendations for the Board of Directors.

The Committee shall establish an income and expense budget for each forthcoming year of operation. The Committee may perform such other duties in connection with the Association's finances as the Executive Committee may from time to time determine.

2. Arbitration Practice Committee, consisting of not less than five members. The Committee shall render advisory assistance in connection with any duties assumed by the Association with respect to administering its Rules of Procedure governing arbitrations held in its Tribunals, and shall have such other duties as the Executive Committee may from time to time determine.

3. Arbitration Law Committee, consisting of not less than five members. The Committee shall render advisory legal assistance to the Office of the General Counsel and promulgate amicus guidelines and review amicus applications submitted to the Association; and shall have such other duties as the Executive Committee may from time to time determine.

4. International Arbitration Committee, consisting of not less than five members. The Committee shall render advisory assistance to the Association in connection with international arbitration matters; and shall have such other duties as the Executive Committee may from time to time determine.

ARTICLE XI—AUDIT

The books of account and financial records of the Association shall be audited at least once a year by a Certified Public Accountant, who shall be selected by the Board with the approval of the members of the Association. The books and audit report shall be available for inspection by any member tof the Board of Directors, or by any committee of members appointed for the purpose by the members of the Association present or voting by proxy at any annual meeting or special meeting called for the purpose of appointing such a committee.

ARTICLE XII—AMENDMENTS

1. These By-Laws may be amended by a two-thirds vote of the members present or voting by proxy at any annual or special meeting of the Association. Written notice of any such proposed change shall be sent to the members in writing at least twenty days prior to the meeting at which it is to be voted upon.

2. An amendment may be proposed by the Board on its own initiative, or upon petition of any five members of the Association.

3. Any such proposed amendment shall be accompanied by a report and recommendation by the Board.

Construction Contract Disputes: How They May Be Resolved Under the Construction Industry Arbitration Rules

CONSTRUCTION CONTRACT DISPUTES

Many builders, contractors, engineers and architects know from painful experience that building contracts sometimes erupt into expensive conflicts.

Specified materials are not always available when needed. Can equal material be substituted for the specified product?

Changes in plans often result in extra charges. What increased charge for "extras" is payable?

Contractors are sometimes subject to penalty clauses for delay. Who caused the delay?

Estimates of construction costs may prove unrealistic. Added costs are a frequent source of conflict.

Because parties to such disputes want them resolved by persons familiar with their business and because they want a prompt and final decision, they specify arbitration in their contracts. Although the construction industry has used arbitration for many years, a significant improvement in the system has only recently taken place.

PRIOR SYSTEMS OF ARBITRATION

Until 1966 construction industry arbitation cases under the existing American Institute of Architects Conditions were either arbitrated informally by each party selecting their own "arbitrator" and these two "arbitrators" selecting a neutral arbitrator, or they were administered by AAA under its Commercial Rules.

The former system resulted in many complaints because there were no rules and no supervision. Moreover, many cases dragged on and created procedural problems.

On the other hand, the AAA procedures, although well-tested, were not specifically designed for the construction industry. And the arbitrators on the National Panel of the AAA were not always suitable for construction cases.

A joint committee of engineers and architects comprehensively studied the use or arbitration in the industry and concluded that, although it provided a generally effective method for resolving contractual disputes, the procedure could be greatly improved by creating a nationwide uniform system specifically for the construction industry.

In 1965 the joint committee was enlarged to include the following organizations: American Consulting Engineers Council, then the Consulting Engineers Council; American Institute of Architects; Associated General Contractors; Associated Specialty Contractors, Inc., the then Council of Mechanical Specialty Contracting Industries; and National Society of Professional Engineers.

After a year of study, new rules were adopted, known as the Construction Industry Arbitration Rules, to be administered by the American Arbitration Association. These rules are now recommended for use by all the organizations in the industry.

Since that time, four additional national organizations have provided for the use of this arbitration system in their form documents—the American Society of Civil Engineers, the Associated Society of Landscape Architects, The American Subcontractors Association and the Construction Specifications Institute. Thus, there are now nine national construction associations using the construction Industry Arbitration Rules.

THE NATIONAL CONSTRUCTION INDUSTRY ARBITRATION COMMITTEE

In 1966, with the object of creating the best possible on-going arbitration system, the National Construction Industry Arbitration Committee was established with the representatives of the various industry and professional associations.

Regional advisory committees were also established to work with the American Arbitration Association's regional offices to improve the available construction panel, to serve as a conduit for information, and to advise the AAA on administrative problems.

To implement these new rules and to meet anticipated growth in cases, the AAA's National Panel of Construction Arbitrators was enlarged with the addition of construction industry arbitrators nominated by the Regional Committees.

HOW TO ARBITRATE UNDER THE CONSTRUCTION INDUSTRY ARBITRATION RULES

Under the Construction Industry Arbitration Rules, arbitration can be provided for in the original contract. This provision is expressed in a *future dispute arbitration clause* of a contract. A clause reading "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof" can be used to take advantage of the new procedures.

In the absence of such a clause, parties can bring an existing dispute to arbitration by means of a signed statement in which both parties briefly describe the issue between them and agree to arbitrate under the Construction Rules.

On receiving the Demand for Arbitration or Submission Agreement, the Arbitration Association sends each party a copy of a list of proposed arbitrators technically qualified to resolve the controversy. In a construction dispute, these names may include builders, contractors, engineers, architects, other businessmen familiar with the construction industry, and attorneys who customarily represent such clients. In cases involving lesser sums one arbitrator is generally appointed. But in larger cases, it may be preferable to have three neutral arbitrators.

Parties are allowed seven days to study the list, cross off any names objected to, and number the remaining names in order of their preference. Where parties want more information about a proposed arbitrator, such information is given on request.

When these lists are returned, the American Arbitration Association compares them and appoints the arbitrator whom the parties have approved. Where parties were unable to find a mutual choice on a list, additional lists may be submitted at the request of both parties.

If parties cannot agree upon an arbitrator, the Association will make administrative appointments, but in no case will an arbitrator whose name was crossed out by either party be appointed.

Arbitrators on AAA panels are generally willing to serve without fee. They volunteer an occasional day as a public service. But after spending two days on a case, the arbitrator must be compensated by the parties. The rate of compensation will then be based upon the amount of service involved and on the number of hearings. Any arrangement for the compensation of an arbitrator is made through the AAA, not directly by him with the parties.

After the arbitrator is appointed, the AAA consults with the parties to determine a mutually convenient time and place for the hearing. Arrangements are made through the Association, rather than directly between the arbitrator and the parties. The reason for this is twofold: it relieves the arbitrator of routine burdens and it eliminates the danger that, in the course of conversations outside the hearing room, one party may offer arguments on the merits of the case that the other has not had an opportunity to rebut.

THE HEARING

Arbitration hearings are less formal than court trials. Arbitrators are not required to follow legal rules of evidence. Rather, they are empowered to listen to all evidence that is relevant and material. Arbitrators often accept evidence that might not be permitted in court. But this does not mean that all evidence is believed or given equal weight.

Each party has a right to be represented by counsel, and the hearing is conducted in a businesslike manner. It is customary for the complaining party to proceed first with his case, followed by the respondent. This order may be varied, however, when the arbitrator thinks it advisable. Each party must try to convince the arbitrator of the correctness of his position and the hearing is not closed until each has had a full opportunity to present his case.

THE AWARD

The purpose of the award is to dispose of the controversy finally and conclusively. It must be handed down within thirty days after the close of the hearing. The power of the arbitrator ends with the making of the award; the decision cannot be changed unless both parties agree to reopen the case, unless the applicable law provides for reopening.

WHAT IT COSTS TO ARBITRATE

As the American Arbitration Association is a nonprofit organization, fees for the arbitration services have been set to cover only the costs of administration. At the filing of a case under the Construction Industry Rules, the claimant must pay a filing fee of $100.00. The balance of the fee is based upon a percentage of the amount of each claim as disclosed at the time of filing, and it is due and payable prior to the appointment of the arbitrator.

MISCELLANEOUS PROVISIONS

In this booklet, we have indicated the answers to some of the most frequently asked questions about how to proceed with arbitration under the Construction Industry Rules. But other matters may also be of interest. The Rules—a closely-printed sixteen-page booklet—answers other procedural questions:

How is the place of arbitration determined, when the parties are unable to agree?

May a claim be amended after proceedings begin?

What must an arbitrator do when he discovers that he once did business with one of the parties?

Who may attend hearings?

Those who would like copies of the full text of these Rules are invited to write for free copies to the American Arbitration Association at any of its regional offices, or to any of the organizations comprising the National Construction Industry Arbitration Committee.

EDUCATION FOR CONSTRUCTION ARBITRATION

The participating associations have also enabled the National Construction Committee to carry out educational programs to inform the industry on the use of arbitration. Speakers, pamphlets and taped seminar presentations by industry leaders on the resolution of disputes may be obtained by writing to the Chairman of the National Construction Committee. The National Committee and the Association would welcome your assistance and support in their efforts to assist the design professions and the construction industry to settle disputes more efficiently and speedily. For information about membership, please write the Chairman, Mr. Thomas J. McGlone, at the American Arbitration Association.

Mr. COULSON. Let me turn to the question of training. We have found that it is helpful, particularly in important cases involving areas where experts are being used as arbitrators, to provide some preliminary training to arbitrators as to the kinds of issues they are likely to encounter, and also as the particular arbitration process under which they are operating.

We recently carried out training for the Justice Department in connection with three neighborhood mediation centers. We have trained many of the members of the panel of arbitrators of the American Arbitration Association over the years. We think that training can be important. The Justice Department and the court system should be encouraged to incorporate some kind of training in the process if this bill becomes law.

Finally, we are encouraged by the indication in this bill that the Federal Government is considering participating in arbitration cases. This bill would involve the Federal Government in a process of nonbinding arbitration. Yet, perhaps the interest presently shown by the Justice Department would indicate that there is a possible change of policy of the Federal Government towards encouraging arbitration in disputes involving various of its administrative agencies with citizens.

Attorney General Bell said that administrative procedures not unlike arbitration are found in many agencies. But, the fact is that

many administrative procedures are entirely unlike arbitration. They are unlike it because they involve the citizen in a long process of administrative and judicial litigation. It's lengthy. It's time-consuming. It's very frustrating. There must be a better way, by offering the individual grievant an opportunity to place their case before an arbitrator for a prompt and final decision. We would hope that to the extent the Federal Government has now indicated an interest in participating as a party in the arbitration process, that this would lead to a study and review of ways that voluntary, final and binding arbitration could be offered to more parties.

We are very pleased and honored to have been invited to testify before you. I would be glad to try to answer any questions you may have.

Senator DeConcini. Mr. Coulson, we thank you very much.

I would like to pay a compliment to your association for the fine work that you have done. Certainly you have helped the judicial system and our system of commerce a great deal.

Mr. Altier has a few questions he would like to submit to you for the record.

Mr. Altier. In your prepared statement, regarding the restriction or the handling of Miller and Jones Act type cases, you suggest that perhaps a class of attorneys who are familiar with the issues of these type cases could be utilized. It is my understanding that the parties under S. 2253 could select their own arbitrator or arbitrators within a specified period of time. Do you feel that this would be a solution or a partial solution to that kind of problem where there is a question of competence in a certain area?

Mr. Coulson. Yes; I think the present draft does give the parties the right to select arbitrators of their own choice. I do not believe they are limited to attorneys. I know in the construction field, very frequently the parties would prefer to have a contractor or engineer-architect sit on that type of case. It would appear from the bill that would be an option available to them.

Mr. Altier. Also in your prepared statement, you indicated a preference for voluntary, as opposed to compulsory, arbitration programs. If the proposal in S. 2253 were limited to a voluntary nonbinding arbitration program, I imagine there would be little or no utilization of such a procedure. Do you have any thoughts on that? Has that ever been attempted in the Federal courts at all?

Mr. Coulson. The Federal Government has a Federal Arbitration Act which gives contractual parties the option to make use of arbitration. That is, private parties, local governments, State governments, authorities have the option——

Mr. Altier. Before filing the case with the court?

Mr. Coulson. Yes. They can make that choice by putting an arbitration clause in their contract, or they can arbitrate an existing dispute.

When the dispute is with the Federal Government, however, they have not had that opportunity. When it comes to Miller Act cases, I believe the statute requires them to make use of the Federal district courts.

If the Miller Act and other Federal acts could be analyzed to make sure that in every case the parties still have this freedom to arbitrate, I think there would be a substantial increase in the amount of private, voluntary, binding arbitration which would greatly reduce the court load, just as the court load has been reduced by the fact that parties have the free right to put arbitration in their contracts. There are millions of contracts that have arbitration clauses in them. Insurance policies, collective bargaining contracts, commercial contracts, leases, and contracts of all kinds, have arbitration in them. That is the free choice of the party because they want the right to select their arbitrator. They want a system that works promptly and decisively. They want the privacy of the arbitration process.

Mr. ALTIER. How about after a case is filed? Is it feasible in a voluntary, nonbinding arbitration program.

Mr. COULSON. Where it is a case between two parties and not a class action, I think the parties, unless there is a limiting statute, have the right to withdraw it from court and submit it to arbitration. At that stage, however, it is seldom done because they are locked in the litigation process, and it is very difficult for them to retract and then go back into arbitration.

Mr. ALTIER. In your prepared statement, you stated that one of the Williamsburg task force reports raised serious questions about a mandatory system providing nonbinding judgments. According to the report, such a proposal may do no more than increase delay in the litigation process. We have some statistics in Philadelphia in that program that during the first 2 years after they raised the jurisdictional limit up to $10,000, the entire civil calendar backlog was reduced from 48 months to 21 months, while the backlog of cases within arbitration was less than 3 months. How do you square the task force report with regard to those statistics?

Mr. COULSON. In the Bronx, in Philadelphia, in Cleveland, and in California, there have been many of these mandatory, nonbinding arbitration systems for relatively small claims which have done exactly what their purpose was. This was to screen out a large percentage of cases that could be resolved through nonbinding arbitration. The question that the Senate has to face, I think, is whether or not that process should be escalated to larger cases and whether it should be installed in the Federal courts, or whether the Federal courts are such that they should offer the full panoply of trial justice to everybody that comes before them.

The American Arbitration Association takes no position on that. We just feel that it should be absolutely clear that this is a different kind of mechanism than the voluntary binding arbitration which is used by people outside of the court system.

Mr. ALTIER. I have one final question. According to the proposal, arbitrators are paid a fee not to exceed $50 a case plus actual expenses.

This fee is within the range currently paid in most of the States that have this compulsory nonbinding program. But, most of the States do not approach the $50,000 damages figure proposed in the bill. Doesn't it seem logical to expect that the fee in the Federal

arbitration program should be higher than the $50 fee proposed under the bill?

Mr. COULSON. Once you have decided that there should be compensation, there should be some relationship between how much time the arbitrator has to spend on the case and what he or she is compensated.

Certainly the average legal fee is far in excess of the nominal $50 amount.

In many of our tribunals where there is a question as to whether arbitrators should serve as a public service to their industry or the the public, or whether they should be paid a nominal fee, arbitrators have indicated, particularly lawyers, a preference not to be paid at all. But if they are to be paid, they should be paid a more realistic fee, which is connected to what they would be expected to do.

Mr. ALTIER. What would you guess would be a more reasonable fee?

Mr. COULSON. Let me give you some analogies from other kinds of arbitration. In the labor field, the per diem fees of labor arbitrators run from $150 to around $300 per day. In the commercial field where our association attempts to arrange compensation to be paid by the parties in cases that would take more than two days, the fees will range from a low of $100. In one unusual, recent case the parties preferred to pay an arbitrator $1000 a day.

In the voluntary arbitration field, it is a matter for the parties to agree on between themselves.

The problem here is that when the Federal Government and the Federal judiciary adopts a mandatory, nonbinding arbitration mechanism, then the Government is forced to set the fee, and it is going to be very difficult. I would suggest that whatever fee the bill fixes upon, whether it be $50 or $100, it would be subject to upward pressure over the years. You may find yourself 10 years down the road with a very, very expensive "snap-on" option to the present litigation process.

Mr. ALTIER. Thank you.

Senator DECONCINI. Thank you very much, Mr. Coulson. We appreciate your testimony. We are going to have some more hearings. I hope we can work with you in the future.

Mr. COULSON. Thank you.

Senator DECONCINI. Our next witness is Judge James Cavanaugh from the court of common pleas in Philadelphia.

Judge, we thank you for coming.

STATEMENT OF JUDGE JAMES R. CAVANAUGH, COURT OF COMMON PLEAS, PHILADELPHIA, PA.

Judge CAVANAUGH. Good morning. On behalf of the Common Pleas Court of Philadelphia County, and I suppose the common pleas court for the entire Commonwealth of Pennsylvania, I appreciate the chance of being here this morning to briefly tell you about our system and to comment on the Federal bill.

Pennsylvania arbitration goes back to 1957 and our experience with compulsory arbitration within the court system has been good.

The limits have gone steadily from $2,000, at the inception, to $10,000 now. There is legislation in Harrisburgh to raise this limit to $20,000.

I think that is an important feature of it, and there is some resistance to that raising of the level which I will comment on later.

Our bill and law withstood early constitutional challenges. It has now settled in and been accepted by the bar and by the public. One feature of it is that a judge decides which cases go into arbitration. Of course, a lawyer can sue for any amount or claim any amount in a case and should not have the right to decide whether the case goes to arbitration or trial before a jury simply by his pleadings. So a judge decides which cases go to arbitration by examining the pleadings and supporting documents.

Lawyers are eligible to serve as arbitrators upon admission to the bar. We do not have any problem getting lawyers. The salary is $70 for the chairman and $40 for each of the other two arbitrators on the panel of three.

Hearings are conducted almost always in the law office of the chairman or any other place that he might select. Hearings are conducted in an informal manner. The rules of evidence are liberally construed. In fact, certain documents are admitted, such as medical reports, bills, weather reports, police reports, salary records, simply by the marking of a document and notifying the other counsel a week in advance and then admission of that into evidence. That, of course, saves a great deal of time and a great deal of expense.

There is, of course, a de novo appeal right from the arbitration award. The appeal rate has been in the neighborhood of 10 percent. The feeling is that as the jurisdiction is increased, however, that the appeal rate will go up.

Insofar as the disincentive to appeal is concerned, the costs are assessed on the party who appeals, and generally this is not more than $200. They cannot be recaptured.

As for our volume—it has been higher in the past than it is now because of no-fault insurance which we have in the Commonwealth. But it seems to have leveled off in the area of 8,000 to 9,000 cases a year. The system is essentially current.

It is not, I submit, a cure to the problem of litigation and backlogs, but it is certainly a useful tool.

With respect to the Senate bill S. 2253, there are several comments that I would like to make. Section 642(b) with respect to qualification of arbitrators, I think it is excellent that there is a minimum qualification of some experience like 5 years as a member of the bar. We are probably going to come up with a similar experience qualification in Pennsylvania.

However, simple membership in the bar is not sufficient. I think there should be some requirement that the attorney be in practice with some experience in civil litigation. This, perhaps, can be handled by the certifying court, but, in any event, it is a necessary ingredient to have successful arbitration.

As for compensation in the amount of $50, that is, in my opinion, inadequate. This is generally what our arbitrators get, but it must be recalled that our limitation of value is $10,000 and the cases are

tried generally within several hours. I would contemplate with the Federal legislation and with permitting values up to $50,000 that, cases may take days, rather than hours, to try. Even though every one agrees that attorneys owe their time and talents to the profession, and that there is a "pro bono" element to this, in my opinion $50 is totally inadequate and something in the neighborhood of $150 per case would be much more appropriate.

With respect to the jurisdictional amount, again I think that $50,000 is too high.

In this type of case you are going to get into products liability cases, and malpractice cases, and some very serious FELA railroad cases, and maritime cases. I would think in those cases the rate of appeal after an arbitration hearing would be much higher than our experience has been in Pennsylvania where the values are lesser. No one, of course, knows what the appeal rate will be, but I would expect it to be at least a third from arbitration of those type of cases.

Moreover, the provision that the notes of testimony may be taken at the arbitration hearing and be used at any later trial on the de novo trial in the Federal court would provide a script for the attorneys and an incentive to appeal if the script is one that might be used to benefit in a trial de novo.

It is my opinion and feeling that the rule should be otherwise. That is, that if there is to be an informal arbitration proceedings, that notes of testimony would be prohibited and the use of those notes on appeal should be prohibited.

The Federal rule of the law provides no methodology, as I see it, for some judicial decision as to who goes into arbitration. The simple Ad Damnum of $50,000 or more would take some one out of arbitration and less would put some one in arbitration. We have found that a judge and, in fact, this is one of my jobs at the present time is to review the file and supporting data, can make a decision as to what the potential of a case is within reason and decide whether or not it goes into arbitration.

The provision in 645(b) that "any person" may be selected, I think, needs revision. This could include, theoretically, a nonlawyer. It could include someone who has not been certified by the court, and, inasmuch as the arbitrator is, to some extent, at least, working within the court system, and is paid by the court subject to the rules of the court, and responsive to the court, I would think that some methodology should be selected so that all of the persons selected as arbitrators, or prior to their selection, would be approved by the court.

As mentioned by the prior witnesses, certain cases will require expertise. That is easily taken care of. You could have a list of attorneys for railroad FELA cases, and a list of attorneys for Jones and Miller Act cases. That could easily taken care of.

With respect to section 646(c), the arbitrators may ignore the Federal rules of evidence. I think this is a good and proper ingredient to successful limited arbitration. However, we have to keep in mind that major litigation will be heard in these cases if the $50,000 limit is adhered to. As you get into more serious cases, it becomes more important that the rules of evidence apply.

With respect to section 464(d), I have already commented that, in my opinion, recording the notes of testimony would be counterproductive. This will provide a script which experienced attorneys can use on a trial de novo to great benefit in the Federal court.

With respect to the so-called disincentive under section 648(d), I believe that it is good to have some sanction for appealing and not successfully appealing, that is, not doing as well or better on appeal as you did in arbitration. We have a sanction which is the costs. The Federal provision for interest, I do not think is sufficiently more to make it unconstitutional or inappropriate and I agree with the idea of interest on appeal for the unsuccessful litigant.

I believe that arbitration as proposed with a $50,000 limit represents a major departure from Federal jurisdiction and, coupled with the elimination of diversity jurisdiction, will be major steps in excluding from the Federal court what we might call people litigation. This includes injured worker suits, motorist's suits, railroader's suits, seaman's suits, although they come under Federal statutes, but they may, if they choose, sue any State court.

I have talked to attorneys about this who are engaged in civil litigation. They do not like the concept of major litigation being arbitrated. It will, therefore, in my opinion, together with the diversity law, if it becomes law, be a reason for more burdens to come upon the State court because the attorneys will either have to or choose to select the State forums.

There is a growing feeling among the public that the Federal courts exist only to tell people how to run their lives, and how to run their homes, and their schools, and their institutions, and it has become a super legislature.

Just to cite the example of the Federal court facilities in my own city, and example of a large urban area, this government has provided the Federal court with $100 million courthouse. We have an excellent court. There is no question about it. They are current with their litigation.

By the same token, we in the State court are trying cases in a courthouse which had its beginning 103 years ago. We are trying civil litigation that was filed in the year 1973.

If the burden is thrown and cast upon the State courts more, their problems, of course, will be greater for the States. There are no resources to build courthouses in the cities, such as my own.

There is a natural tendency, I would think, within the U.S. Congress, to listen with some sympathy to the pleadings of the Federal courts, your cousins. But I would ask you not to forget the vast system of State courts existing throughout this country which are harnessed with this litigation and which must take this litigation. If the Federal courts are to divest themselves of a substantial part of their civil litigation, we will find that we are burdened with it.

In Philadelphia, I think, about 40 percent of the civil litigation is diversity cases. Another large percentage, I think, would go by the wayside if the attorneys were faced with $50,000 arbitration.

Thank you.

Senator DeConcini. Judge, I thank you very much.

In your experience, have there been any comprehensive studies or reports?

Judge CAVANAUGH. Yes; on our compulsory arbitration program we have filed with my statement, and with my cohorts in Philadelphia, we have filed reports. We have a lot of statistics, as I said. We have been really successfully, but an important factor is that the limit is $10,000. This is a lower tier of litigation. We do it in criminal cases, too.

Someone, of course, has a jury trial right in a criminal case even more than a civil case, but all misdemeanors are tried before a judge without a jury with the right of appeal de novo. This is how we flush out the minor cases both civilly and criminally. It is a necessary, and perhaps evil, but a necessary ingredient in a large metropolitan system.

Senator DECONCINI. Thank you.

Mr. Altier has a few questions.

Mr. ALTIER. The Eastern District of Pennsylvania has begun, or will be beginning, an experiment by local rule. From your perspective, do you have any indication as to the bar's interest with regard to the local rule experiments?

Judge CAVANAUGH. Yes. Judge Fullham has spoken to the bar and there is, I think, a spirit of cooperation in Philadelphia being selected as one of the three jurisdictions to try this. There is a spirit of cooperation although there is a great deal of doubt among members of the bar as to the efficacy of the program.

I am sure, in the tradition of our bar, and we have a very fine civil bar, that you will have a very fair example of just how well this systems works, because there will be full cooperation. Already a number of lawyers have been selected and asked to be selected to act as arbitrators even though this will represent a loss of income for the time spent.

Mr. ALTIER. I am aware that in Philadelphia a certificate of readiness is filed upon completion of discovery. Under the Federal bill, there is no arbitration referral until discovery is completed, or, or within the 120-day limit, which ever occurs first. What are your thoughts on this 120-day limit?

Judge CAVANAUGH. I think the 120-day limit is harsh, particularly when we are talking about major litigation. That is where depositions and interrogatories and medical examinations and other things have to take place.

I do not think there should be such a limitation or if there is a limitation, it should be as much as 6 months.

The court does not have that great an interest in seeing cases disposed of in the shortest possible period of time. The litigants deserve time to explore a discovery and settlement negotiations and within a reasonable period of time to come to trial. I would hope that the 120-day limit could be expanded substantially.

Mr. ALTIER. To a reasonable time, or do you have any time in particular?

Judge CAVANAUGH. I would leave it up to the litigants to file some certification of readiness with an outside limit of a year.

Mr. ALTIER. In addition to your comments, do you have any other advice that you could offer the subcommittee on our work on this bill?

Judge CAVANAUGH. I would urge that you reconsider the amount, particularly in the pilot programs, and lower than amount to somewhere in the neighborhood of $20,000 to $25,000.

I know that diversity begins at $10,000, but I think there are substantial numbers of cases and a substantial universe with which to work and get a better sample of how this works. You are going to get into too many involved multiday cases at the $50,000 figure.

Mr. ALTIER. Thank you.

Senator DECONCINI. Judge, we thank you very much for your testimony. We appreciate your coming down today.

Without objection, Judge Cavanaugh's written testimony will be inserted in its entirety in the record at this point.

[Material follows:]

STATEMENT OF JUDGE CAVANAUGH

Although voluntary arbitration was permissible in Pennsylvania as early as 1836, the modern history of arbitration in Philadelphia begins in 1958, with adoption of a compulsory arbitration program. This program was adopted by the Board of Judges of the Court of Common Pleas in accord with Section 3 of the Commonwealth of Pennsylvania's 1957 Arbitration Act (Pa. Law 1957, No. 181).

Initially restricted to cases of $2,000 or less, the limit was raised to $3,000 for all cases in 1968 and to $5,000 in 1970 for voluntary stipulations.

In September 1971, the Board of Judges raised the limit to $10,000 in response to enabling legislation passed by the State Legislature only two months prior. This quick action reflects the satisfaction of the Bench with this program, and the subsequent results reflect the satisfaction of the great majority of the trial Bar. There is current legislation under study in Harrisburg to raise the permissible limit to $20,000.

Two early cases established the legitimacy of Philadelphia's Compulsory Arbitration Program. In Application of Smith,[1] a Lancaster County petitioner averred that the program in his county denied him of his jury trial right as guaranteed by the Pennsylvania Constitution. The Pennsylvania Supreme Court held that the allowance of a trial *de novo* protected the jury trial right, and the Court praised the concept for "paving the way for the speedier trial of actions involving larger amounts * * *."

In *Talhelm* v. *Buggy*,[2] the Pennsylvania Supreme Court denied petitioner's claim that the 1952 Act was an invalid violation of the Pennsylvania Constitution of 1874 which provided that "all Judges required to be learned in the law * * * (and) shall be elected * * *."

The present program provides that all cases wherein the amount of controversy (exclusive of interest and costs) shall be $10,000 or less should be submitted, heard and decided by a Board of three Arbitrators. Actions involving real property, matters of equity or cases previously arbitrated are statutorily barred from the program. It is assumed by the Court that all otherwise eligible actions are to be heard by arbitrators regardless of any *ad damnum* claim unless one of the parties petitions for *Major Trial Listing*. The latter is obtained by the filing of a petition with the Civil Calendar Judge, who grants such status when it appears that the suit on the face would justify an award of $10,000 or more. If the petition is denied, the case is ordered on the Compulsoory Arbitration List.

All cases, regardless of amounts, are placed on the trial list only upon the filing of a Certificate of Readiness with the Court. If there are no procedural difficulties or requests for additional pleadings or discovery, arbitration cases are promptly forwarded to an Arbitration Panel Chairperson who is responsible for arranging the hearing. The Chairperson is required to fix a date and time for hearing, no earlier than thirty-five days and no more than seventy-five days

[1] 381 Pa. 223, 112 A 2d. 625 A.L.R. 2d. 420 (1955), appeal dismissed, 76 S Ct. 105, 350 U. S. 858, 100 L. Ed. 762.
[2] 109 D. & C. 2d. 482, 68 Dauph. 310 (1955).

after appointment. It is obvious then that a simple case with diligent counsel can be heard and disposed of in just a few months.

The Panel Chairperson is authorized to grant one continuance, but any subsequent continuances are subject to the approval of the Supervising Judge for Arbitration. If, after a panel is assigned, any counsel maintains there is sufficient cause that the case not be heard within the mandated seventy-five day period, application must be made by Arbitration Program Petition.

If a Report and Award is not received within ninety days of the panel assignment, a computer print-out letter is sent over the signature of the Supervising Judge. Panel Chairpersons are required to respond by letter, explaining the reason for any delay in hearing or filing a Report and Award. If the reason is insufficient, the case is ordered returned and the Chairperson may be removed from the list of qualified arbitrators.

The members of the Boards are appointed by the appropriate Deputy Court Administrator from a list of members of the Bar who have indicated their consent to serve. The list is automated and proceeds alphabetically, and three cases are assigned to each panel.

Following assignment, the Chairperson is responsible for all further arrangements and proceeding to hearing. The Arbitrators are guided by the Philadelphia Arbitration Rules, copies of which I have provided to this committee. Although the Boards have the general powers of a Court, the proceedings are somewhat informal and are usually held in the law office of the Chairperson. Although the Board of Arbitrators is charged with responsibility to conduct the hearings with due regard to law and the established rules of evidence, the Arbitration Rules specifically provide that the "rules of evidence shall be liberally construed to promote justice." Medical evidence, for example, may be submitted in the form of bills or on letterheads, on the condition that at least one week's written notice shall have been given to the adverse party, accompanied by a copy of the document to be offered in evidence. Since 1972, the rules have required that all medical evidence shall be in written form and medical testimony will be admissible only with the permission of the Court. The number of such requests has been minimal.

Police, weather and salary-loss reports also are admissible without further proof of authenticity. The supervising Judge of the Arbitration Program retains full supervisory powers over questions related to the rules of evidence and conduct of the hearings.

The Boards are required to file a Report and Award with the Deputy Court Administrator within fifteen (15) days following the hearing. The latter is responsible for assuring the Report and Award's compliance with all relevant law, rules and procedures, and for its docketing and filing.

Compensation for the Chairperson has been set at $70, and the other Board members receive a fee of $40. If a case has been settled or discontinued within three (3) days of the hearing, the Board members are nevertheless compensated. If it is settled more than three days prior, the Board is required to obtain and hear another case.

Any party to an arbitration proceeding is entitled to a *de novo* appeal to the Common Pleas Court (the Court of general trial jurisdiction). The appeal must be made within twenty (20) days after docketing of the Award, and the appellant must pay an appeal fee plus all costs accrued to the time of taking the appeal. The latter costs are non-recoverable. Appellant must also post a bond, with surety sufficient to double the amount of likely trial costs. Jury demand and payment of fees must be made within ten (10) days of the filing of the appeal.

The success of Philadelphia's arbitration program is evidenced by and dependent upon its low rate (less than 10%) of appeals and the relatively miniscule number of appeals actually tried. The date is amorphous, but one sample of almost 800 appeals from arbitration indicated that less than 14% were tried to a verdict by Judge or jury.

It is also noteworthy that the pattern of dollar amounts and liability determinations of appeal verdicts is markedly similar to that of Arbitration Awards. A majority of verdicts are for less than $3,000, and close to 80% are less than $5,000. This correlation and the low rate of appeal indicate a high level of "quality" decisions in the arbitration program.

The costs of operation are negligible compared to most other programs, for the Chairperson is responsible for providing the hearing place and for much of

the case administration. In addition to the $150 costs for arbitrators, the remaining costs are the services of a Deputy Court Administrator with a staff of four. The program also requires the services of the Supervising Judge for Arbitration and a law clerk assigned to him for this program only.

Although these latter costs are substantial, it should be noted that the personnel involved would likely be required for operation of a larger trial list if arbitration were not available. Contrasted to the much greater cost of a formal Court proceeding, arbitration is a rare bargain indeed.

The most important aspect, of course, is the number of cases successfully diverted from the Court's load. The record in this matter speaks for itself. The report, "Recapitulation of the Reports from 5/9/58 to 12/31/67," submitted separately to you, indicates the first decade of arbitration saw slightly more than 66,000 cases filed and slightly less than 65,000 disposed. The second decade becomes slightly more complicated to report, owing to the introduction of our Municipal Court system with authority for cases of less than $2,000 and of No-Fault Insurance with specified threshold limits. These two innovations have apparently impacted both our Arbitration Program and Major Trial List, but the data is presently too amorphous to determine the extent.

Nevertheless, it is clear that the Compulsory Arbitration Program continues to do yeomen's work for our system. As the "Statistical Summary Year to Date December 1977" indicates, our program received slightly less than 9,000 cases last year and disposed of slightly less than 9,000. It should be noted as well that of those available for disposition, most are either out to a Panel with hearings being arranged, or awaiting the lapse of the thirty-day Certificate of Readiness objection period. This means that there is virtually no backlog in our Compulsory Arbitration Program.

In short, we of the Philadelphia Bench and Bar are very proud of our Arbitration Program. It enjoys broad endorsment as evidenced both by the Bar's continuing support for its expansion and the continuing low rate of appeal of less than 10%. I will be pleased to answer your questions, and have available additional forms and documents utilized in the program for your perusal.

Exhibit IV

RECAPITULATION OF THE 13 STATISTICAL ARBITRATION REPORTS ISSUED FROM MAY 9, 1958 TO DEC. 31, 1967, INCLUSIVE

	May 9, 1958	Aug. 15, 1958	Dec. 31, 1958	June 30, 1959	Dec. 31, 1959	Dec. 31, 1960	Dec. 31, 1961	Dec. 31, 1962	Dec. 31, 1963	Dec. 31, 1964	Dec. 31, 1965	Dec. 31, 1966	Dec. 31, 1967
Reports and awards	611	2,077	3,343	6,831	8,414	10,724	15,437	19,470	23,275	26,641	30,158	35,202	40,541
Settlement and disclosure	581	1,615	2,197	3,578	4,196	5,066	7,884	9,104	10,311	11,480	12,789	14,345	15,831
Miscellaneous disposition	39	115	200	462	697	942	1,010	1,730	2,173	2,491	2,888	3,314	3,749
Deferred	47	40	60	119	163	123	122	159	128	162	188	251	338
Continued	207	590	802	983	703	266	494	289	419	532	898	1,126	626
Hold	0	96	125	268	201	120	231	306	398	574	1,003	1,461	2,234
Number pending before panels	779	833	780	1,060	323	26	248	164	168	112	121	528	1,249
Annual totals of cases processed from Feb. 17, 1958 to Dec. 31, 1967	2,264	5,366	7,507	13,301	14,697	17,267	25,426	31,222	36,872	41,992	48,045	56,227	64,568
Unprocessed	6,148	4,243	4,334	1,463	2,779	5,408	2,541	2,760	3,403	4,133	4,530	2,998	1,457
Total referred to complete arbitration	[2] 8,412	9,609	11,841	14,764	17,476	22,675	27,967	33,982	40,275	46,125	52,575	59,225	66,025
Periodic filings from Feb. 17, 1958	[2] 8,412	1,197	2,232	2,923	2,712	5,199	5,292	6,015	6,293	5,850	6,450	6,550	6,800

[1] The reason for the variation in the number of findings and/or reports and awards listed herein and in exhibit 7, is due to the fact that some trial orders require more than one report and award by reason of garnishment, retrial, et cetera.

[2] Includes accumulated backlog of 7,102 cases from 1932 to February 18, 1958.

STATISTICAL SUMMARY COURT OF COMMON PLEAS OF PHILADELPHIA YEAR TO DATE THROUGH DECEMBER TERM 1977

	Defendant records available for disposition Jan. 3, 1977	New defendant records received during report period	Total defendant records to be disposed	Total defendant record dispositions	Defendant records available for disposition Jan. 3, 1978	Change in open record status during 1977
Trial Division:						
Civil:						
Arbitration	3,407	8,839	12,246	8,985	3,261	(146)
Major Cases	4,533	2,161	6,694	2,670	4,024	(509)
General Cases	2,157	1,913	4,070	1,170	2,900	743
Subtotal	10,097	12,913	23,010	12,825	10,185	88
Criminal						
Homicide	308	355	663	389	274	(34)
Felony Jury	[1] 570	1,664	2,234	1,362	982	302
Felony Non-Jury	[1] 2,683	6,134	8,817	6,988	1,829	(854)
Subtotal	3,561	8,153	11,714	8,739	2,975	(586)
Family Court Division:						
Adoptions	110	1,101	1,211	1,130	81	(29)
Domestic Relations	1,211	14,105	15,326	12,858	2,468	1,247
Juvenile	3,232	16,944	20,176	17,205	2,971	(261)
Unmarried Mothers	2 192	9,362	11,554	9,059	2,495	303
Subtotal	6,755	41,512	48,267	40,252	8,015	1,260
Orphans Court Division	82	6,829	6,911	6,859	52	(30)
Grand total	20,496	69,407	89,902	68,675	21,227	732
Miscellaneous:						
Probation	16,704	4,928	21,632	4,395	17,237	533
Parole	3,404	1,437	4,841	1,100	3,741	337
Total probation supervision	20,108	6,365	26,473	5,495	20,978	870
PCHA petitions	200	256	456	239	217	17

[1] The starting figures for 1977 reflect a transfer of 150 defendant records from the felony jury program to the felony nonjury.

COMMON PLEAS COURT OF PHILADELPHIA Term, 19

ARBITRATION HEARING NOTICE No.

Plaintiff	*Defendant*
VS.	

TO: Counsel for Plaintiff

TO: Counsel for Defendant

TO: Counsel for

The above case has been submitted by the Arbitration Commissioner for Arbitration.

Pursuant to Rule for Arbitration III, the following date, time and place are hereby set for hearing:

DATE TIME	PLACE
MEMBER OF PANEL	MEMBER OF PANEL
COPIES TO	CHAIRMAN OF PANEL *(Name and Address)*
	DATE OF THIS NOTICE

Please make special note of the following:

1. Please read carefully the material contained in the Arbitration kit furnished herewith.
2. The Chairman shall fix a date and time for hearing not less than thirty-five (35) days and not more than seventy-five (75) days after appointment and shall give not less than thirty (30) days written notice to the arbitrators, parties, or their counsel for the date, time and place of hearing.
3. If this case has been settled, or if there has been any other change of status, please notify the Chairman **IMMEDIATELY.**
4. Reports and Awards of Arbitrators must be fully completed before signing by the panel members. Any panel member signing the award in blank will be automatically disqualified from further service.

30-159 (Rev. 1/77)

Rules for Compulsory Arbitration, Philadelphia County

(Adopted by the Board of Judges of the Court of Common Pleas of Philadelphia County September 23, 1971; as amended to September 15, 1977)

Philadelphia Arbitration Rules

RULES FOR COMPULSORY ARBITRATION

Rule I. Cases for submission

A. All cases, which are now or later at issue, when the amount in controversy (exclusive of interest and costs) shall be Ten Thousand Dollars ($10,000) or less, including appeals from the Municipal Court, except those involving title to real estate or actions in equity shall be submitted and heard and decided by a Board of Arbitrators, consisting of three (3) members of the Bar of Philadelphia County, to be selected as hereinafter provided in Rule II.

B. Cases which are not at issue and whether or not suit has been filed may be referred to a Board of Arbitrators by Agreement of Reference signed by all

parties or their counsel, and when the respective counsel so desire may contain stipulations with respect to facts submitted or agreed or defenses waived. In such cases, the Agreement of Reference shall take the place of the pleadings in the case and shall be filed of record.

C. Cases in arbitration shall be ordered for hearing by filing a Certificate of Readiness, in duplicate, pursuant to the rules applicable thereto. Any case ordered for hearing by a Certificate of Readiness which does not contain a certification that the amount in controversy is in excess of Ten Thousand Dollars ($10,000) or where a determination is made that the amount in controversy does not exceed Ten Thousand Dollars ($10,000) shall be placed on the Arbitration List.

Rule II. Appointment of arbitrators from list

A. In all cases subject of arbitration the members of the Board of Arbitration shall be appointed by the Deputy Court Administrator for Arbitration from the list of members of the Bar of Philadelphia County. The members of the Bar qualified to act shall include only those engaged in the practice of their profession who have filed with the Deputy Court Administrator their consents so to act. Attorneys desiring to be eliminated from the list may so notify the Deputy Court Administrator for Arbitration by letter.

B. The list shall be divided alphabetically into three numerically equal groups. Appointment to each Board shall be made in alphabetical order, one from each group.

C. The Board of Arbitrators shall consist of three members (a lesser number is not permitted). The first named shall be Chairman of the Board. Not more than one member of a law partnership or an association of attorneys shall be appointed to the same Board, nor shall an attorney act as arbitrator who is related by blood or marriage to any party to the case or to any attorney of record in the case, or who is a law partner or an associate of any attorney of record in the case. An attorney shall not act as arbitrator in a case involving a party or party's insurance carrier either of whom he represents in other matters.

D. The Deputy Court Administrator for Arbitration shall assign to each Board appointed by him three cases which shall be taken in order from the Arbitration List.

Rule III. Hearings. When and where held: Notice

A. Hearings shall be held at a center city location at a place provided by the Chairman of the Board, unless counsel for all parties and the entire Board agree on another location. The Chairman shall fix a date and time for hearing not less than thirty-five (35) days and not more than seventy-five (75) days after the appointment of the Board of Arbitrators, and shall give at least thirty (30) days notice in writing to the Arbitrators and the parties or their counsel for the date, time and place of such hearing. This permits Chairman discretion in granting at least one continuance without necessity of Court approval. No hearings shall be fixed for Saturdays, legal holidays, or evenings, except upon agreement by counsel for all parties and the arbitrators.

B. In the event that the Chairman cannot schedule or hold a hearing within seventy-five (75) days from the date of the assignment of the case to him because of the inability of counsel for any party to proceed to hearing, the Chairman shall notify the Deputy Court Administrator who shall, subject to the direction of the Supervising Judge for Arbitration, authorize the return of that case and assign another case to that panel. Subject to the direction of the Supervising Judge for Arbitration the case so returned shall be referred to a special panel maintained by the Court for such cases in order that it may be disposed of without further delay.

C. Wherever any case has been assigned to two Boards of Arbitration without a hearing having been held, the case shall be certified by the Deputy Court Administrator for Arbitration to the Supervising Judge for Arbitration who shall summon the parties or their counsel. The Supervising Judge for Arbitration shall have the power to make any appropriate order, including an order for non pros or an order that case be heard and an award made whether or not the parties or their counsel appear.

D. When the arbitrators shall be assembled, they shall be sworn or affirmed justly and equitably to try all matters at variance submitted to them with oath

or affirmation may be administered to them by any person having authority to administer oaths, or in the absence of such person, by one of their number.

E. The Board of Arbitrators shall conduct the hearing before them with due regard to the law and according to the established rules of evidence, except for such changes as may be contained in item 4 below. Generally, rules of evidence shall be liberally construed to promote justice.

The Board shall have the general powers of a court including, but not limited to, the following powers:

1. To issue subpoenas to witnesses to appear before the Board.

2. To compel the production of all books, papers and documents which they shall deem material to the case.

3. To administer oaths or affirmations to witnesses, to determine the admissibility of evidence, to permit testimony to be offered by depositions and to decide the law and the facts of the case submitted to them.

4. In actions involving personal injury and/or damage to property, to allow bills and reports of hospitals, doctors, dentists, registered nurses, licensed practical nurses and physical therapists, bills for drugs and medical appliances, and bills for or estimates of property damage, all of such bills and estimates in an unlimited amount, to be received in evidence on their respective letters or bill heads, on condition that at least one week's written notice shall have been given to the adverse party accompanied by a copy of the bill, report or estimate to be offered in evidence.

(a) Upon good cause shown, with notice to all other parties, a party may apply to the Supervising Judge for Arbitration at least three days prior to the arbitration hearing for an order directing that the maker of a bill, report or estimate above-referred to appear as a witness or permitting the adverse party to subpoena such person, upon such conditions as the court may direct.

(b) In the event an order is not granted after application under (a), the failure of a party to call such person as a witness shall not give rise to an unfavorable inference, nor shall it be considered prejudicial to such party.

(c) A bill for property damage, or an estimate thereof shall bear a certificate of the maker that it is true and correct, and that the charge or charges appearing therein are fair, reasonable and those customarily charged.

(d) Police, weather, salary loss, or traffic signal reports, as well as standard United States Government life expectancy tables, to the extent that they are admissible in accordance with present rules of evidence, shall be admitted without formal proof as to authenticity, etc.

(e) In the case of an estimate, the party intending to offer the estimate shall forward with his notice to the adverse party together with the copy of the estimate a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, attaching a copy of the receipted bill showing the items of repair made and the amount paid.

F. The Supervising Judge for Arbitration shall have full supervisory powers with regard to any questions that arise in all arbitration proceedings and in the application of these rules.

G. Witness fees in any case referred to said Board of Arbitrators shall be in the same amount as now or hereafter provided for witnesses in trials in the Common Pleas Court of Philadelphia and the costs in any case shall be paid by the same party or parties by whom they would have been paid had the case been tried in the Common Pleas Court of Philadelphia.

H. A stenographer or court reporter shall not be present nor shall any recording device be permitted at the arbitration hearing unless authorization is obtained from the court upon application made for good cause at least three days prior to such hearing, with notice to all parties.

Rule IV. Filing of report and award

A. Within fifteen (15) days after the hearing, the Board of Arbitrators shall file a report and award with the Deputy Court Administrator for Arbitration and on the same day shall mail or otherwise forward copies thereof to all parties or their counsel. The report and award shall be signed by the arbitrators who heard the case. The Deputy Court Administrator for Arbitration shall make a note of the filing of the report and award on his docket and then file the original report and award with the Prothonotary.

B. The report and award, unless appealed from as herein provided, shall be final and shall have all the attributes and legal effect of a verdict. If no appeal is taken within the time allotted therefor, judgment may be entered on the award upon praecipe, after which execution process may be issued upon such judgment as in the case of other judgments.

Rule V. Compensation of arbitrators

A. The Chairman of a Board of Arbitrators, if he has signed an award or files a minority report, shall receive as compensation for his services in each case a fee of $70.00. Each other member of a Board of Arbitrators who has signed an award or files a minority report, shall receive as compensation for his services in each case a fee of $40.00.

When more than one case arising out of the same transaction is heard at the same hearing or hearings, it shall be considered as one case insofar as compensation of the arbitrators is concerned. In cases requiring hearing of unusual duration or involving questions of unusual complexity the Supervising Judge for Arbitration, on petition of the members of the Board and for cause shown may allow additional compensation. The members of a Board shall not be entitled to receive their fees until after filing a report and award with the Deputy Court Administrator for Arbitration. When the report and award is filed, the Deputy Court Administrator shall issue an order for payment of such fees. Fees paid to arbitrators shall not be taxed as costs nor follow the award as other costs.

B. In the event that a case shall be settled or discontinued more than three (3) days prior to the date set for hearing, the Board members shall not be entitled to be paid a fee in the case. Upon receiving notice that the case has been settled or discontinued under these circumstances, the Deputy Court Administrator shall assign another case to the same Board.

Rule VI. Right of appeal

A. Any party may appeal from the action of the Board of Arbitrators to the Common Pleas Court of Philadelphia County. The right of appeal shall be subject to the following conditions, all of which shall be complied with within twenty (20) days after the entry of the award of the Board on the docket in the office of the Prothonotary.

1. The appellant shall file: a notice of appeal with the Prothonotary and pay the appeal fee fixed therefor, and serve a copy of such notice upon the adverse party or his counsel; an affidavit that the appeal is not taken for delay but because he firmly believes injustice has been done; an appeal bond with sufficient surety in double the amount of costs likely to accrue; and a Certificate of Readiness in duplicate marked "Appeal from Arbitration" ordering the case for trial on the Civil General Trial List.

2. The appellant shall pay all costs accrued to the time of taking the appeal.

3. The appellant shall first repay to the Deputy Court Administrator for Arbitration for the use of the county all fees received by the members of the Board of Arbitration in the case in which the appeal is taken, but not to exceed fifty (50) percent of the amount in controversy. The sum so paid shall not be taxed as costs in the case and shall not be recoverable by the appellant in any proceedings.

B. All appeals shall be de novo.

C. In the event of an appeal from the award or decision of the Board of Arbitration. the arbitrators shall not be called at the time of hearing to testify as to what took place before them in their official capacity as arbitrators.

D. Any party may file exceptions with the Prothonotary from the award or decision of the Board of Arbitration within twenty (20) days from the filing of the report and award, for either or both of the following reasons and for no other:

1. That the arbitrators misbehaved themselves in the conduct of the case.

2. That the action of the Board was procured by corruption or other undue means.

Copies of the exceptions shall be served upon each arbitrator and the Deputy Court Administrator for Arbitration within forty-eight (48) hours after filing. It shall be the obligation of the party filing the exceptions to order them on the Civil Motion List promptly in accordance with the rules pertaining to the List. If such exceptions shall be sustained, the report and award of the Board shall be vacated by the Court and the case referred to a new panel for disposition.

Senator DeConcini. Our next witness is Lewis Jay Gordon, chairman of the Compulsory Arbitration Committee of the Philadelphia Bar Association.

Mr. Gordon, we want to thank you for traveling here today to be here with us and to give us your thoughts on the bill.

Will you please proceed. Your entire statement will appear in the record.

Without objection, Mr. Gordon's written statement will be inserted into the record at this point.

[Material follows:]

THE PHILADELPHIA COMPULSORY ARBITRATION EXPERIENCE AS IT RELATES TO PROPOSED SENATE BILL 2253

(Adapted and Prepared by Lewis Jay Gordon, Chairman, Compulsory Arbitration Committee, Philadelphia Bar Association)

HISTORY

By statute (Act of 1836, Pub. L. 715, 88; 5 P.S. § 21), compulsory arbitration was made available in Pennsylvania. The initial statute made it lawful for "either party in any civil suit or action * * * to enter * * * a rule of reference, wherein he shall declare his determination to have arbitrators chosen * * * for the trial of all matters in variance in the suit between the parties."

The act was amended on January 14, 1952 by Pub. L. (1951) 2087, § 1, to provide that "the several courts of Common Pleas may by rule of court, provide that all cases which are at issue where the amount in controversy shall be one thousand dollars ($1,000.00) or less, except those involving title to real estate, shall first be submitted to and heard by a board of three (3) members of the bar of the county for consideration and award." At that time, only rural Butler County, in Western Pennsylvania, adopted compulsory arbitration by rule of court.

By 1958, however, 53 of the 67 counties in Pennsylvania had adopted compulsory arbitration. By then, the award limit had been increased to $2,000.00. Today, the award limit is $10,000.00 in Philadelphia County (Philadelphia), Allegheny County (Pittsburgh) and a few other highly populated counties and $5,000.00 in almost all other counties.

There is currently a bill being introduced in the Pennsylvania Legislature which would authorize the President Judge in each county to raise the jurisdictional limits of arbitration in his county up to $20,000.00 at his sole discretion.

PROCEDURES

Under the rules of the arbitration program of the Philadelphia Court of Common Pleas, a copy of which is attached hereto, it is mandatory that all civil claims in which the amount in controversy is less than $10,000.00, be arbitrated except actions in equity and those involving title to real estate. If it is averred that the award is likely to exceed $10,000.00, a petition must be filed with the court seeking major trial listing. If the Civil Calendar Judge believes that a verdict in excess of $10,000.00 is likely, the petition is granted. If not, the case is ordered placed on the Arbitration list.

After the certificate of readiness, a copy of which is attached hereto, is filed by counsel, the Court of Common Pleas holds the case for 30 days before assigning it to a panel of arbitrators. This built-in delay allows the opposing attorneys ample opportunity to file motions to have the case placed on the major case calendar and also opportunity for negotiations and preparations to be completed. The court has found that a holding time shorter than 30 days results in such an increase in subsequent petitions and requests for continuance as to be self-defeating.

At the expiration of the 30 days, the deputy court administrator for arbitration assigns the case, along with two other cases, to a board of three arbitrators who are selected at random. The arbitrators are drawn from the existing list

of names organized in alphabetical order in three columns. Each potential arbitrator is a member of the Philadelphia bar, who has made known his willingness to serve. There is no other qualification for arbitrators, who are compensated at the rate of $70.00 for the chairman and $40.00 for each panel member per hearing. (In some of the counties surrounding Philadelphia, the compensation rate is at a uniform rate of approximately $65.00 for each member of the panel. This is due to the fact that in those counties, the scheduling of hearings is done by the court administration rather than by the panel chairman and in those counties court house facilities are provided.) The current compensation is somewhat less than the amount recommended by the Compulsory Arbitration Committee of the Philadelphia Bar Association a few years ago, but has had to be limited due to an inadequacy of funding for the court system. It is hoped that this amount will be increased to $75.00 for the chairman and $50.00 for each panel member per hearing when the new fiscal year begins on July 1, 1978.

Once the case is assigned to the board, the arbitration chairman, who also is selected randomly, must set a date and time for hearing, no earlier than 35 days nor more than 75 days after his appointment. No hearings are scheduled for Saturday, legal holidays or evenings except upon agreement of all parties and the arbitrators.

If a hearing is not scheduled within the prescribed time and a satisfactory explanation of the delay is not offered by the arbitration chairman, the deputy court administrator will assign the case to another panel. Hearings usually are held in the office of the chairman of the board, although the court does provide conference rooms if they are available and necessary.

Most hearings take between one and two hours. If the hearings consume more than the standard amount of time, the rules permit the chairman of the panel to petition the supervising judge for additional compensation for himself and the other panel members. Such additional compensation is awarded on the basis of the complexity of the case, the number of attorneys and witnesses involved and the number of hours actually spent in hearing and deciding the case.

All questions concerning arbitration rules and procedures and all requests for continuances (if such continuance would exceed the limit of 75 days from date of appointment to hearing) are handled, through the office of the supervising judge, by filing arbitration program petitions. The petitions, a copy of which is attached hereto, are in standard, printed form which has been refined through the years and requires the petitioner to state the name and court term and number of the case, the names and telephone numbers of counsel, including the chairman, the scheduled date and hour of the hearing, whether or not there has been a previous continuance (and, if so, the reason), the nature of the problem prompting the petition and the relief requested. When such a petition is filed, counsel for the moving party must notify opposing counsel and must state the position of the latter as well as that of the chairman. All such petitions must be certified as to accuracy of stated facts and must be signed by the petitioning attorney.

The petitioning procedure has proven to be an excellent method for controlling the arbitration program. An average of 50 such petitions are filed each week. Each petition is reviewed carefully before rule and order are issued and entered on the petition itself. Copies are sent to attorneys named on the pettition. Many of the petitions require oral argument before the supervising judge. There are approximately eight to ten such arguments each week in cases in which counsel disagrees or in which an unusual problem exists.

The board of arbitrators is charged with responsibility to conduct the hearings with due regard to law and according to the established rules of evidence, with the exception that medical evidence, in the form of bills or on letterheads, may be submitted with the condition that at least one week's written notice shall have been given to the adverse party, accompanied by a copy of the document to be offered in evidence. Since 1972, the rules have required that all medical evidence shall be in written form and medical testimony will be admissible only with the permission of the court. The number of such requests has been minimal.

Police, weather and salary loss reports also are admissible without further proof of authenticity. The arbitration rules provide further that "generally, rules of evidence shall be liberally construed to promote justice." The supervising judge of the arbitration program retains full supervisory powers over ques-

tions related to the rules of evidence and the conduct of the hearings and is available at all times for immediate resolution of disputes.

After the hearing, the board of arbitrators has 15 days in which to file a report with the deputy court administrator for arbitration. All three arbitrators must sign the report. The award, which is arrived at by majority vote, has the effect of a final judgment.

Any party to an arbitration proceeding may appeal the arbitrators' award. The appeal must be filed within 20 days and the appellant must pay all costs accrued to the time of taking the appeal. He must also reimburse the county for the arbitrators' fees, a sum which is not recoverable in the appeal proceeding. All appeals are *de novo*, with right to jury trial and the arbitrators award is not admissible at the trial.

PERFORMANCE

Arbitration is one of the most successful methods for disposing of civil actions. The program has exhibited a strong performance over the last 19 years. Since the time (1971) that the arbitration limits were raised to $10,000.00, a total of 84,210 cases has been disposed out of 87,471 available cases. This record was achieved despite the fact that the number of cases entering arbitration rose dramatically. For example, total cases to the disposed in 1970 was 10,016 as compared to 22,629 cases in 1971. Case dispositions in 1971 (over 12,500) were twice the annual average for the years 1958–70.

During 1977, 12,831 civil cases were filed while 10,097 remained for trial from 1976. Thus, the total number of cases to be disposed of in 1977 was 22,928. The arbitration program accounted for 70 percent or 8,985 case dispositions. Twenty-one percent, or 2,676 cases were disposed of through the major case program, that is, cases in which the amount in controversy exceeds $10,000. The balance of dispositions, 1,170, or nine percent, was achieved through the general case list which includes appeals from arbitration verdicts and from Municipal Court (small claims) and actions in real estate and equity. Arbitration continues to be the chief means by which civil cases are disposed.

The statistics below show the program's case volume, i.e., the number of cases entered and disposed of by means of arbitration. The average monthly filing/disposition rate is also given.

	Cases available for trial in January	New cases received	Total cases to be disposed	Total dispositions	Year end case inventory
1971	3,546	19,183	22,729	12,557	10,172
1972	10,172	12,862	23,034	16,190	6,844
1973	6,844	11,987	18,831	13,163	5,668
1974	5,668	10,958	16,626	12,370	4,256
1975	4,256	10,480	14,736	10,873	3,863
1976	3,863	9,616	13,479	10,072	3,407
1977	3,407	8,839	12,246	8,985	3,261

Average filings per month		Average dispositions per month	
1977	749	1977	749
1976	801	1976	839
1975	873	1975	906
1974	913	1974	1,031
1973	999	1973	1,097
1972	1,072	1972	1,349
1971	3,546	1971	1,046

Positive performance was likewise indicated by the fact that dispositions exceeded filing in 8 of 12 months in 1977.

A certain percentage of cases assigned to arbitration settle before an award is actually made by the arbitration panel. A settlement was reached before the hearing date in 20 percent, or 1,755 cases, during 1977. For the same year, a total of 4,837 panel awards were made, of which 79 percent of the arbitrators' decisions were for the plaintiff and 21 percent for the defendant.

The distribution of the dollar awards (including cases with counter claims) was as follows:

Amount of award	Number of cases	Percentage of total
0	1,023	21.1
$1 to $999	762	15.8
$1,000 to $1,999	866	17.9
$2,000 to $2,999	601	12.4
$3,000 to $3,999	432	8.9
$4,000 to $4,999	299	6.2
$5,000 to $9,999	691	14.3
$10,000 to $19,999	163	3.4
Total	[1] 4,837	100.0

[1] Total excluded cases settled prior to hearing and nonactive cases.

The majority of the dollar awards were less than $3,000.00 and more than 80 percent were less than $5,000.00.

The success of the arbitration program is dependent upon a low rate of appeal. During 1977 there were 717 appeals filed, 431 of which actually commenced trial de novo proceedings. Of the remaining cases (286), 168 petitions were withdrawn and 118 cases were settled or discontinued before trial. While 431 cases commenced trial proceedings, 331 cases reached a settlement during trial so that only 100 cases actually received a verdict by judge or jury. This means that, overall, only 14 percent of appeals required a full court trial.

The pattern of the dollar amounts of appeal verdicts is markedly similar to that of arbitration awards. The majority of verdicts were for dollar amounts of less than $3,000.00 and 78 percent involved amounts less than $5,000.00.

In general, then, the distribution pattern of awards by arbitrators correlates quite closely, both on questions of liability and assessment of damages, with verdicts rendered by judges and juries for similar cases on appeal. This correlation and the low rate of appeal indicate a high level of "quality" decisions under the Philadelphia arbitration program.

The types of filings mainly arbitrated are motor vehicle accidents, assumpsit and trespass cases. A detailed breakdown of all disposed arbitration cases for 1977 in the various claim categories appears below:

Case type	Disposed arbitration records	Percent
Trespass:		
Motor vehicle accident	4,628	51.50
Other traffic accident	180	2.00
Property owners	922	10.26
Product liability	145	1.61
Federal employment Liability act	3	.03
Miscellaneous	641	7.13
Appeals from municipal court	62	.69
Assumpsit	1,647	18.33
Ejectment	2	.02
Foreign attachment	1	.01
Fraud, debtor attachment	5	.05
Libel and slander	18	.20
Replevin	13	.14
Malpractice-other	60	.66
Assessment of damages	541	6.02
Other unclassified	117	1.30
Grand totals	8,985	100.00

ARBITRATION AS VIEWED BY THE PHILADELPHIA TRIAL BAR

The Arbitration Program, which initially was a radical change from the existing system, did not, of course, meet with instantaneous approval from members of the Philadelphia trial bar. The major changes in the system as it

evolved, namely the increase in the jurisdictional limit to $10,000.00 and the liberalization of the rules of evidence for the introduction of documents in lieu of testimony, (Arbitration Rule III, E. 4) have only been successful due to the fact that the system evolved in a slow, orderly process so that the initial wariness of the trial bar was overcome, rather than by thrusting these changes upon the bar all at one time.

The program functioned at a $2,000.00 award limit till 1968 when the award limit was raised to $3,000.00. In January, 1970, the Philadelphia Board of Judges, at the urging of both the plaintiff and defense bars, agreed to allow for voluntary stipulation to a $5,000.00 award limit. By that time, the persistingly increasing backlog of civil cases had resulted, in many instances, in a seven year waiting period from filing to trial. Due to the high level of satisfaction with the arbitration program on the part of both plaintiff and defense attorneys and the insurance industry, another evaluation of the award limit was made and in February, 1971, requests were mailed to the Bar for voluntary stipulations to the arbitration program with an award limit of $10,000.00. Approximately 15,000 cases existed in the category between the $5,000.00 statutory limit and the $10,000.00 level proposed for voluntary stipulation. The results of this mailing indicated the willingness of the Bar to expand its reliance on arbitration as the primary means for resolving smaller civil disputes. Out of the 30,000 requests sent, over 18,000 were returned indicating the attorneys agreed to submit to arbitration. In more than one thousand cases was there an actual refusal to arbitrate.

The introduction of Rule III E 4 into the arbitration rules in the early 1970's was likewise an innovative approach which has overcome the initial dire prophecies that it would lead to all sorts of fraud, fabrications, and perversions of the trial process. It has removed the often costly expense and/or inavailability or reluctance of expert witnesses, employers, record custodians, etc. in smaller cases to appear at the hearing and at the same time has shortened the hearing time to a reasonable length which encourages more of the active trial practitioners to take part in the arbitration process as arbitrators. Rule III E 4(a) has been rarely exercised, which is a good indication of the overall acceptance of this provision by the trial bar.

At the present time the Philadelphia Court System is trying jury cases where suit was instituted in the latter part of 1973. By contrast, the great majority of arbitration cases are heard by a panel within one year after suit has been filed.

One can imagine where our trial list would be were it not for the arbitration program, which accounts for roughly 70 percent of all civil cases. Without arbitration, our courts would be hopelessly bogged down. That we are able to avoid this tremendous logjam and keep the arbitration program moving is a tribute to the members of the Philadelphia bar, who deserve high praise for their cooperation in serving as panelists and giving their valuable time to the program.

PRESENT PROBLEM AREAS

It is the concern of the trial bar that our profession, which already has a public image problem, does not present to the many litigants, whose only connection with the court system is through the arbitration program, a negative view toward the judicial process.

The large influx of new lawyers into practice has resulted in the last few years in a doubling of the number of arbitration panelists. Many of these are fresh out of law school, without jobs, have never appeared in court, and immediately upon admission to the bar sign up to be an arbitration panelist so as to add a small supplement to their income. Many of these arbitrators also have no adequate facilities for properly holding hearings. The experience and quality of these has disturbed many members of the trial bar. In addition, many long time members of the bar are not in active practice and/or have never appeared in a courtroom.

At the same time it would appear that due primarily to the efforts of the Pennsylvania No-Fault Law the number of cases arbitrated a year has decreased and will level off in the area of 7,000 cases a year. Even the proposed increase of the award limit to $20,000.00 would, in all likelihood, only increase the number of cases heard to approximately 10,000. However, this increase would also require the establishment of greater qualifications for panelists due to the greater magnitude and complexity of cases.

As a result of the above, the Compulsory Arbitration Committee of the Philadelphia Bar Association on April 4, 1978 unanimously recommended to the Board of Judges an amendment to Rule II of the arbitration rules, a copy of which is attached hereto, which will provide certain additional qualifications for panelists. It is thought that these qualifications, while eliminating between one-half and two-thirds of those parties currently serving as arbitrators will leave a more select qualified panelist to hear cases and will still not result in a panelist being chosen for a panel more than three times in one year. This would not be considered an onerous burden by members of the trial bar since this was the approximate frequency with which one was chosen in the 1960's.

Additional suggestions have been made to the Compulsory Arbitration Committee in regard to having at least one member of each panel certified as knowledgeable in regard to the type of case to be arbitrated and/or a system similar to one used by the American Arbitration Association by which opposing counsel would have the opportunity to select the
panel by striking off names from a larger list of attorneys, similar to a jury selection, to arrive at the eventual panel. These suggestions are currently being explored as to both their administrative and financial feasibility.

SENATE BILL 2253

Senate Bill 2253 is an admirable attempt to finally introduce Compulsory Arbitration into the Federal Judicial System. It has been estimated that the cost to the Philadelphia Court System for each day of a jury trial in both salaries of jurors, judge, and court personnel and use and maintenance of court room space is in excess of $800.00. It would, in all likelihood, be at least that or more in the Federal System. Any procedure that can alleviate both the cost and expense of trial for both the court system and the litigants and which at the same time alleviates the delays in the judicial system without affecting the quality of the justice dispensed is a most welcome innovation and deserves the support of both the bench and bar.

There are, however, a number of problem areas in the legislation as current drafted. Some of these may require changes in the legislative language and others are merely areas where care must be undertaken in the administration of the act.

I shall deal with these in section order.

Section 642

The same problems currently being experienced in Philadelphia could develop if Section (b)(2) is not expanded to set forth some additional guidelines. There is no provision that the arbitrator is actively engaged in the practice of law, or has even ever set foot in a courtroom.

Section 643

The compensation provided for the arbitrators is grossly inadequate. There has been difficulty in Philadelphia getting the very busy and active trial practitioners to remain on the arbitration panels. In the cases to be arbitrated under this legislation, the majority of the cases are likely to take one to two days rather than one to two hours as in the Philadelphia experience due to the greater complexity and value of the claims, especially since there is no provision in the legislation for presentation of evidence similar to that provided under Rule III E 4. of the Philadelphia Rules. It is unreasonable to expect busy and active practitioners to be willing to take a few days out of their schedule for the amount of compensation being proffered, yet it is these very people who it is necessary to have available as panel members if both the trial bar and the public are to have confidence in and give their support to this program. In addition, no provision has been made for supplemental compensation in a very long and protracted case. Finally, some provision should be made for compensation of arbitrators where cases are settled just at or a short time prior to the scheduled hearing. (See Philadelphia Rule V.) It is usually the scheduling of the arbitration hearing which has finally caused the parties to settle the case and the attorney panelists who have blocked out on their calendars the time for the hearing are in many cases unable to reschedule other matter on very short notice.

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Section 644

Some thought should be given to initially lowering the jurisdictional limit to a figure below $50,000.00. The initial forcing of substantial cases to arbitration may well have the tendency to alienate a substantial segment of the trial bar whose support is necessary for a successful arbitration program.

Section 645

No guide lines are provided to enable the clerk of the court, a non-judicial officer, to determine whether the value of a claim is under or over $50,000.00. Such decision should not be left exclusively within his discretion. The time limit of 120 days to complete discovery is also completely unrealistic. A certification system as to readiness to proceed filed by one of the attorneys of record would be more practical.

Section 646

Scheduling of an arbitration hearing in a substantial case within thirty days would appear to be impractical. To find three arbitrators and at least two trial attorneys available on an agreed date within a one-month period would appear to be slim. A longer period would eliminate what would probably be the need for numerous requests for continuances addressed to the court which would be a waste of judicial manpower. (See Philadelphia Rule III A.)

Some thought should be given to provision similar to Philadelphia Rule III E4 in order to avoid lengthy and costly hearings.

Section 648

Section (c) should spell out more clearly that the arbitrators may not be called to testify even for impeachment purposes. (See Philadelphia Rule VI C.)

While Section (d) is an admirable attempt to prevent appeals taken merely for delay, I believe that a serious question can be raised as to the constitutionality of a cost and interest penalty which is contingent upon the result obtained in the trial *de novo*. Such a provision may be interpreted as a severe infringement of a party's basic right to trial. If the constitutionality issue is resolved in the affirmative, thought should be given to either a definite interest rate or a formula by which such rate may be devised.

The aforesaid thoughts are not intended to be critical of the act in question, the principles and intent of which is probably imperative to the continued growth and development of our judicial system in an ever expanding and complicated society. It is, however, necessary, for a viable arbitration system to be successful, to have the full cooperation and backing of the trial bar making use of same. Consideration of the suggestions cited above may turn possible hostility to the proposed system into the positive experience already at work in the Philadelphia Court System and such positive results can go a long way to improve the quality and public image of our much criticized judicial system.

Appendix

Rules for Compulsory Arbitration Philadelphia County

(Adopted by the Board of Judges of the Court of Common Pleas of Philadelphia County Sept. 23, 1971; as amended to Sept. 15, 1977)

RULE I. CASES FOR SUBMISSION

A. All cases, which are now or later at issue, when the amount in controversy (exclusive of interest and costs) shall be Ten Thousand Dollars ($10,000) or less, including appeals from the Municipal Court, except those involving title to real estate or actions in equity shall be submitted and heard and decided by a Board of Arbitrators, consisting of three (3) members of the Bar of Philadelphia County, to be selected as hereinafter provided in Rule II.

B. Cases which are not at issue and whether or not suit has been filed may be referred to a Board of Arbitrators by Agreement of Reference signed by all parties of their counsel, and when the respective counsel so desire may contain stipulations with respect to facts submitted or agreed or defenses waived. In such cases, the Agreement of Reference shall take the place of the pleadings in the case and shall be filed of record.

C. Cases in arbitration shall be ordered for hearing by filing a Certificate of Readiness, in duplicate, pursuant to the rules applicable thereto. Any case

ordered for hearing by a Certificate of Readiness which does not contain a certification that the amount in controversy is in excess of Ten Thousand Dollars ($10,000) or where a determination is made that the amount in controversy does not exceed Ten Thousand Dollars ($10,000) shall be placed on the Arbitration List.

RULE II. APPOINTMENT OF ARBITRATORS FROM LIST

A. In all cases subject of arbitration the members of the Board of Arbitration shall be appointed by the Deputy Court Administrator for Arbitration from the list of members of the Bar of Philadelphia County. The members of the Bar qualified to act shall include only those engaged in the practice of their profession who have filed with the Deputy Court Administrator their consents so to act. Attorneys desiring to be eliminated from the list may so notify the Deputy Court Administrator for Arbitration by letter.

B. The list shall be divided alphabetically into three numerically equal groups. Appointment to each Board shall be made in alphabetical order, one from each group.

C. The Board of Arbitrators shall consist of three members (a lesser number is not permitted). The first named shall be Chairman of the Board. Not more than one member of a law partnership or an association of attorneys shall be appointed to the same Board, nor shall an attorney act as arbitrator who is related by blood or marriage to any party to the case or to any attorney of record in the case, or who is a law partner or an associate of any attorney of record in the case. An attorney shall not act as arbitrator in a case involving a party or party's insurance carrier either of whom he represents in other matters.

D. The Deputy Court Administrator for Arbitration shall assign to each Board appointed by him three cases which shall be taken in order from the Arbitration List.

RULE III. HEARINGS. WHEN AND WHERE HELD; NOTICE

A. Hearings shall be held at a center city location at a place provided by the Chairman of the Board, unless counsel for all parties and the entire Board agree on another location. The Chairman shall fix a date and time for hearing not less than thirty-five (35) days and not more than seventy-five (75) days after the appointment of the Board of Arbitrators, and shall give at least thirty (30) days notice in writing to the Arbitrators and the parties or their counsel for the date, time and place of such hearing. This permits Chairmen discretion in granting at least one continuance without necessity of Court approval. No hearings shall be fixed for Saturdays, legal holidays, or evenings, except upon agreement by counsel for all parties and the arbitrators.

B. In the event that the Chairman cannot schedule or hold a hearing within seventy-five (75) days from the date of the assignment of the case to him because of the inability of counsel for any party to proceed to hearing, the Chairman shall notify the Deputy Court Administrator who shall, subject to the direction of the Supervising Judge for Arbitration, authorize the return of that case and assign another case to that panel. Subject to the direction of the Supervising Judge for Arbitration the case so returned shall be referred to a special panel maintained by the Court for such cases in order that it may be disposed of without further delay.

C. Wherever any case has been assigned to two Boards of Arbitration without a hearing having been held, the case shall be certified by the Deputy Court Administrator for Arbitration to the Supervising Judge for Arbitration who shall summon the parties or their counsel. The Supervising Judge for Arbitration shall have the power to make any appropriate order, including an order for non pros or an order that case be heard and an award made whether or not the parties or their counsel appear.

D. When the arbitrators shall be assembled, they shall be sworn or affirmed justly and equitably to try all matters at variance submitted to them with oath or affirmation may be administered to them by any person having authority to administer oaths, or in the absence of such person, by one of their number.

E. The Board of Arbitrators shall conduct the hearing before them with due regard to the law and according to the established rules of evidence, except for such changes as may be contained in item 4 below. Generally, rules of evidence shall be liberally construed to promote justice.

The Board shall have the general powers of a court including, but not limited to, the following powers:

1. To issue subpoenas to witnesses to appear before the Board.

2. To compel the production of all books, papers and documents which they shall deem material to the case.

3. To administer oaths or affirmations to witnesses, to determine the admissibility of evidence, to permit testimony to be offered by depositions and to decide the law and the facts of the case submitted to them.

4. In actions involving personal injury and/or damage to property, to allow bills and reports of hospitals, doctors, dentists, registered nurses, licensed practical nurses and physical therapists, bills for drugs and medical appliances, and bills for or estimates of property damage, all of such bills and estimates in an unlimited amount, to be received in evidence on their respective letters or bill heads, on condition that at least one week's written notice shall have been given to the adverse party accompanied by a copy of the bill, report or estimate to be offered in evidence.

(a) Upon good cause shown, with notice to all other parties, a party may apply to the Supervising Judge for Arbitration at least three days prior to the arbitration hearing for an order directing that the maker of a bill, report or estimate above-referred to appear as a witness or permitting the adverse party to subpoena such person, upon such conditions as the court may direct.

(b) In the event an order is not granted after application under (a), the failure of a party to call such person as a witness shall not give rise to an unfavorable inference, nor shall it be considered prejudicial to such party.

(c) A bill for property damage, or an estimate thereof shall bear a certificate of the maker that it is true and correct, and that the charge or charges appearing therein are fair, reasonable and those customarily charged.

(d) Police, weather, salary loss, or traffic signal reports, as well as standard United States Government life expectancy tables, to the extent that they are admissible in accordance with present rules of evidence, shall be admitted without formal proof as to authenticity, etc.

(e) In the case of an estimate, the party intending to offer the estimate shall forward with his notice to the adverse party together with the copy of the estimate a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, attaching a copy of the receipted bill showing the items of repair made and the amount paid.

F. The Supervising Judge for Arbitration shall have full supervisory powers with regard to any questions that arise in all arbitration proceedings and in the application of these rules.

G. Witness fees in any case referred to said Board of Arbitrators shall be in the same amount as now or hereafter provided for witnesses in trials in the Common Pleas Court of Philadelphia and the costs in any case shall be paid by the same party or parties by whom they would have been paid had the case been tried in the Common Pleas Court of Philadelphia.

H. A stenographer or court reporter shall not be present nor shall any recording device be permitted at the arbitration hearing unless authorization is obtained from the court upon application made for good cause at least three days prior to such hearing, with notice to all parties.

RULE IV. FILING OF REPORT AND AWARD

A. Within fifteen (15) days after the hearing, the Board of Arbitrators shall file a report and award with the Deputy Court Administrator for Arbitration and on the same day shall mail or otherwise forward copies thereof to all parties or their counsel. The report and award shall be signed by the arbitrators who heard the case. The Deputy Court Administrator for Arbitration shall make a note of the filing of the report and award on his docket and then file the original report and award with the Prothonotary.

B. The report and award, unless appealed from as herein provided, shall be final and shall have all the attributes and legal effect of a verdict. If no appeal is taken within the time allotted therefor, judgment may be entered on the award upon praecipe, after which execution process may be issued upon such judgment as in the case of other judgments.

RULE V. COMPENSATION OF ARBITRATORS

A. The Chairman of a Board of Arbitrators, if he has signed an award or files a minority report, shall receive as compensation for his services in each case a fee of $70.00. Each other member of a Board of Arbitrators who has signed an award or files a minority report, shall receive as compensation for his services in each case a fee of $40.00.

When more than one case arising out of the same transaction is heard at the same hearing or hearings, it shall be considered as one case insofar as compensation of the arbitrators is concerned. In cases requiring hearing of unusual duration or involving questions of unusual complexity the Supervising Judge for Arbitration, on petition of the members of the Board and for cause shown may allow additional compensation. The members of a Board shall not be entitled to receive their fees until after filing a report and award with the Deputy Court Administrator for Arbitration. When the report and award is filed, the Deputy Court Administrator shall issue an order for payment of such fees. Fees paid to arbitrators shall not be taxed as costs nor follow the award as other costs.

B. In the event that a case shall be settled or discontinued more than three (3) days prior to the date set for hearing, the Board members shall not be entitled to be paid a fee in the case. Upon receiving notice that the case has been settled or discontinued under these circumstances, the Deputy Court Administrator shall assign another case to the same Board.

RULE VI. RIGHT OF APPEAL

A. Any party may appeal from the action of the Board of Arbitrators to the Common Pleas Court of Philadelphia County. The right of appeal shall be subject to the following conditions, all of which shall be complied with within twenty (20) days after the entry of the award of the Board on the docket in the office of the Prothonotary.

1. The appellant shall file: a notice of appeal with the Prothonotary and pay the appeal fee fixed therefor, and serve a copy of such notice upon the adverse party or his counsel; an affidavit that the appeal is not taken for delay but because he firmly believes injustice has been done; an appeal bond with sufficient surety in double the amount of costs likely to accrue; and a Certificate of Readiness in duplicate marked "Appeal from Arbitration" ordering the case for trial on the Civil General Trial List.

2. The appellant shall pay all costs accrued to the time of taking the appeal.

3. The appellant shall first repay to the Deputy Court Administrator for Arbitration for the use of the county all fees received by the members of the Board of Arbitration in the case in which the appeal is taken, but not to exceed fifty (50) percent of the amount in controversy. The sum so paid shall not be taxed as costs in the case and shall not be recoverable by the appellant in any proceedings.

B. All appeals shall be de novo.

C. In the event of an appeal from the award or decision of the Board of Arbitration, the arbitrators shall not be called at the time of hearing to testify as to what took place before them in their official capacity as arbitrators.

D. Any party may file exceptions with the Prothonotary from the award or decision of the Board of Arbitration within twenty (20) days from the filing of the report and award, for either or both of the following reasons and for no other:

1. That the arbitrators misbehaved themselves in the conduct of the case.

2. That the action of the Board was procured by corruption or other undue means.

Copies of the exceptions shall be served upon each arbitrator and the Deputy Court Administrator for Arbitration within forty-eight (48) hours after filing. It shall be the obligation of the party filing the exceptions to order them on the Civil Motion List promptly in accordance with the rules pertaining to the List. If such exceptions shall be sustained, the report and award of the Board shall be vacated by the Court and the case referred to a new panel for disposition.

GUIDELINES FOR COMPULSORY ARBITRATION

Digested from the Compulsory Arbitration Rules:

1. Arbitrators should be only those members of the Bar who are engaged in the practice of law in Philadelphia County.

2. Hearings shall be held at a Center City location at a place provided by the Chairman of the Board, during normal working hours.

3. The Chairman shall fix a date and time for hearing not less than thirty-five (35) days and not more than seventy-five days (75) days after the appointment of the Board of Arbitrators, and shall give at least thirty (30) days notice in writing to the Arbitrators and the parties or their counsel for the date, time and place of hearing. This permits the Chairman discretion in granting at least one continuance without the necessity of Court approval.

4. The Board of Arbitrators shall consist of three (3) members, a lesser number is NOT permitted even by agreement of counsel.

5. No cases should be returned to the Deputy Court Administrator without prior approval of the Supervising Judge.

6. The Board of Arbitrators shall conduct a hearing before them with due regard to the law and according to the established rules of evidence, except for such changes as are noted below. Generally, rules of evidence should be liberally construed to promote justice.

7. The Board shall have the general powers of the court including but not limited to, the following powers:

a. To issue subpoenas to witnesses to appear before the Board.

b. To compel the production of books, papers and documents which are material to the case.

c. To administer oaths or affirmations to witnesses, determine the admissibility of evidence and to permit testimony to be offered by depositions.

d. In actions involving personal injury, to allow bills and reports from hospital, doctors, dentists, registered nurses, licensed practical nurses and physical therapists, bills for drugs and medical appliances, all of such bills in an unlimited amount, to be received in evidence on the respective letters or bill-heads on condition that at least one week's written notice shall have been given to the adverse party accompanied by a copy of the bill or report to be offered into evidence.

(1) Bill for property damage or estimate thereof shall bear a certificate of the maker that it is true and correct and that the charge or charges appearing thereon are fair, reasonable, and those customarily charged.

If an estimate is offered, a statement should indicate whether or not the property was repaired and if it was, whether the repairs were made in full or part, attaching copy of the receipted bill showing items of repair made and amount paid.

(2) Police, weather, salary loss or traffic signal reports, U.S. life tables are admissible to the extent they would be admissible in accordance with the present rules of evidence, without formal proof.

8. The Supervising Judge shall have full supervisory powers with regard to any questions that arise in all arbitration proceedings and in the application of these rules.

9. A stenographer or court reporter shall not be present unless authorization is obtained from the Court.

10. Under the new rule which does not permit Awards to be signed in blank, the following is suggested:

a. The caption, type of case, attorneys' names and addresses may be filled in by the Chairman *prior* to the hearing;

b. After the hearing, the Award may be typed or hand-written prior to signing by the Arbitrators;

c. Since fifteen (15) days is permitted to file an Award, the Award may be circulated for signatures, if so desired;

d. Only one original need be signed by all panelists and photocopies of same may be made, and on the same day copies should be mailed to all parties or their counsel.

11. In the event that a case is settled within the three (3) days of the date set for the hearing, the Board members shall be entitled to file the report and award as "settled within 3 days of the date of the hearing". Cases settled prior to that time shall not have a report and award filed for that case, but the Deputy Court Administrator shall assign another case to the same Board.

12. Chairmen should be sure to place the names and addresses of all parties to the action in the caption and be sure that the statement of the award conforms to the language required in the entry of a judgment for or against the parties in the cause of action heard before the Board.

* IMPORTANT: 19-A MUST BE FILLED OUT

Fill out in Duplicate
Return to Room 380 City Hall

ARBITRATION PROGRAM PETITION

1. Counsel for Petitioner _____ Date of Filing _____
2. Name of Case _____
3. Court Term & No. _____
4. Pltf's Counsel _____ 4-A. Phone # _____
5. Def. Counsel _____ 6. Phone # _____
7. Add'l. Def. Counsel _____ 8. Phone # _____
9. Add'l. Def. Counsel _____ 10. Phone # _____
11. Panel Chairman _____ 11-A. Phone # _____
12. Date and Hour of Hearing _____
13. Date Notices Sent _____
14. Cont'd before? _____ 15. No. of Times _____
16. At whose request _____
17 Reason for prior continuance(s): _____

_____

18. Have all counsel been notified of this request? (Yes/No) Date: _____
19. Nature of Problem and Relief Requested _____

_____

_____

_____

_____

_____

_____

*19-A. Statement as to Position of other Counsel and Panel Chairman _____

_____

_____

_____

20. Are you requesting conference with Judge Eiseman? _____

O R D E R

(for use of Court only)

_____

_____

_____

_____

_____

_____

_____

3101 (Revised 4/21/75)

CERTIFICATE OF READINESS *(To be executed by Trial Counsel only)*	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL LISTING	TO CALENDAR JUDGE DATE PREPARED

COURT, TERM AND NUMBER	TYPE TRIAL REQUESTED ☐ Jury ☐ Non-Jury ☐ Arbitration	EST. TRIAL TIME Days	DO NOT USE THIS SPACE

PLAINTIFF (S) ☐ *Check Block If a Minor Is a Party to the Case*

DEFENDANT (S) ☐

ADDITIONAL DEFENDANT (S) ☐

INSURANCE CARRIER

TYPE OF CASE – *CHECK (V) ONLY ONE CATEGORY*

V	CODE	DESCRIPTION	V	CODE	DESCRIPTION
	010	TRESPASS – M.V. ACCIDENT		045	FRAUD, DEBTOR ATTACHMENT
	011	TRESPASS – OTHER TRAF. ACC.		050	LIBEL AND SLANDER
	012	TRESPASS – vs. PROP. OWNERS		055	MANDAMUS
	013	TRESPASS – PRODUCT LIABILITY		060	QUIET TITLE
	014	TRESPASS – F.E.L.A.		065	QUO WARRANTO
	015	TRESPASS – MISCELLANEOUS		070	REPLEVIN
	016	APPEALS FROM MUNICIPAL COURT		075	SCI. FA. SUR. M.L.
	020	ASSUMPSIT		080	TAX CASES
	025	EQUITY		085	MALPRACTICE
	030	EMINENT DOMAIN		090	APPEALS FROM ARBITRATION
	035	EJECTMENT		095	ASSESSMENT OF DAMAGES
	040	FOREIGN ATTACHMENT		099	OTHER *(Describe)*

SETTLEMENT NEGOTIATION INFORMATION	AMOUNT AT ISSUE $	DATE MAJOR CASE PETITION FILED *(If applicable)*

Note: All cases will be assigned to arbitration unless they are excluded from arbitration by statute, or a major case petition has been filed or is filed with the certificate of readiness.

Please place the above captioned case on the trial list.

I certify that all discovery in the case has been completed; all necessary parties and witnesses will be available; serious settlement negotiations have been conducted; the case is ready in all respects for trial; that a copy of this Certificate of Readiness has been served on all counsel having an interest in the case; and, unless a higher amount is indicated the amount at issue does not exceed $10,000.00.

Signature of Trial Counsel

COUNSEL WHO WILL ACTUALLY TRY THE CASE		FIRM NAME *(If Applicable)*
FOR THE PLAINTIFF	TELEPHONE NO.	
FOR THE DEFENDANT	TELEPHONE NO.	
FOR ADDITIONAL DEFENDANT (S)	TELEPHONE NO.	

30-68 (Rev. 11/71) ☐ *Check here if reverse is used for additional information*

Proposed Amended Rule II

RULE II. APPOINTMENT OF ARBITRATORS FROM LIST

A. In all cases subject to arbitration the members of the Board of Arbitration shall be appointed from the list of qualified members of the Bar of Philadelphia County. The members of the Bar qualified to act must file with the Deputy Court Administrator their consents to so act and must possess the following qualifications:

(a) All panelists shall have been engaged in the active practice of law for a minimum period of three years subsequent to their admission to the Supreme Court of Pennsylvania. The Chairman of all panels shall have been engaged in the active practice of law for a minimum of five years subsequent to his or her admission to the Supreme Court of Pennsylvania.

(b) All arbitrators shall be required to initially certify that they have tried a civil case in any forum in Pennsylvania.

(c) All arbitrators shall be required to annually certify that they are engaged in the active practice of law and maintain their principal office in Philadelphia County.

(d) All arbitrators, whether currently serving as arbitrators or not, shall be bound by the aforesaid requirements and those now serving not so qualified shall be removed from the list of arbitrators until such time as they meet the aforesaid qualifications.

Attorneys desiring to be eliminated from the list may so notify the Deputy Court Administrator for Arbitration by letter.

B. The list of qualified arbitrators shall be divided into one list for all qualified chairmen and two other lists, each containing all qualified arbitrators. Appointment to each Board shall be made in alphabetical order, one from each group.

C. The Board of Arbitrators shall consist of three members. Not more than one member of a law partnership or an association of attorneys shall be appointed to the same Board, nor shall an attorney act as arbitrator who is related by blood or marriage to any party to the case or to any attorney of record in the case, or who is a law partner or any associate of any attorney of record in the case. An attorney shall not act as arbitrator in a case involving a party or party's insurance carrier either of whom he represents in other matters.

D. The Deputy Court Administrator for Arbitration shall assign to each Board appointed by him three cases which shall be taken in order from the Arbitration List.

STATEMENT OF LEWIS JAY GORDON, ESQUIRE, CHAIRMAN, COMPULSORY ARBITRATION COMMITTEE, PHILADELPHIA BAR ASSOCIATION

Mr. GORDON. Thank you very much, Senator.

The Philadelphia Bar Association wholeheartedly supports arbitration as a means of settling disputes. If it wasn't for the arbitration system in Phlidelphia, almost every small claim up to the amount of the $10,000 we're currently hearing, would probably take 4 to 5 years until it reached its ultimate disposition.

It has been estimated at the present time that 70 percent of the civil litigation other than small claims court comes through the arbitration system and this is, of course, a substantial amount of the litigation in the city. As Judge Cavanaugh has indicated, we already are dealing with 8,000 to 9,000 cases a year. These are being handled entirely by attorneys who are acting as volunteer for the compensation that has been indicated.

The whole system is supported wholeheartedly by the bar. There are certain problems which have arisen but the problems have not been major and they are ones we have been able to attend to.

At the present time, we have in Philadelphia, approximately 6,000 attorneys of whom about 4,000 are serving as arbitrators. The one problem we have been faced with now, with the $10,000 limitation, and as Judge Cavanaugh has indicated, the raising of the limitation to $20,000 is the quality of the people who are serving as arbitrators.

The principal problem is that many people just out of law school do not have jobs, or they have low-paying jobs, and they are signing up as arbitrators and they have no other qualifications. The bar association will have before it, and the board of judges will have before it shortly, an amendment to the rules which just passed our arbitration committee, to place qualifications on arbitrators.

We feel this will not be burdensome to the system as the amount of cases has decreased as the result of no-fault insurance.

The big problem seems to be the fact that a person who is out practicing law for a year, even though he has just graduated from law school, does not have the special expertise in seeing people and understanding testimony and understanding problems that he would get by actually taking part in the system and acting as a litigator himself. We are trying to build in the additional qualifications that a person has taken part in litigation and have been out a specific number of years before he can serve as an arbitrator.

To that extent I am glad to see that the act as proposed, does provide for the 5 years, but as Judge Cavanaugh also indicated, the mere fact that the person has been admitted 5 years is not enough and some additional qualifications should be built in. We have too many people right now in Philadelphia who have been out 15 or 20 years but have never tried a case or appeared in a courtroom in their life. This does not, of course, qualify them to be arbitrators.

The success of any arbitration system depends on the members of the bar who are sitting as arbitrators. For it to be successful, they have to agree that it is something that is going to work and will help them. You are using them as your arbitrators. They are your basic source material. There has been much apprehension about the bill raising this to $50,000. The reason arbitration has worked in Philadelphia, even to the $10,000 limit, is the fact that we have reached that limit gradually through a process of experience. We started at $2,000 and had 10 years at $2,000 before it was gradually raised to $3,000 and then to $5,000 and then to $10,000.

This gradual raising of the limit has increased the confidence of the bar in the system. To start out suddenly at a $50,000 limit, cold turkey, so to speak, would be, I think, a big hindrance in getting people to serve.

This, of course, brings us to the compensation factor. I agree that if there is to be compensation—and this is subject to the committee's determination, and I think there is a basis for saying that we should serve gratis—but if there is to be compensation, I feel it has to be compensation that is reasonable.

We have right now, in spite of the numbers of attorneys in Philadelphia who are members of the bar, an estimate that only 100 defense attorneys try 90 percent of the defense cases and only 300 plaintiff's attorneys try 70 percent of the plaintiff's cases. Maybe another 500 to 600 have some inclination in these fields. This means that out of 6,000 attorneys, only 1,000 are really involved in litigation.

Of these people that are serving now as arbitrators, your top litigators, your top dozen or two dozen are not serving on compulsory arbitration panels because of the time element involved, and because of their busy schedule, and not so much because of the fee.

But, if you are going to do anything to encourage people to serve, the $50 will obviously not encourage even your second line litigators in this regard. The $70 paid to the chairman in Philadelphia is paid because he sets up the hearings himself. The act does not indicate how the hearings will be set up in terms of scheduling and getting attorneys together. The surrounding counties in the Philadelphia

area are paying $65 to $70 without the attorneys setting up the hearing. This is per case.

Certainly, $50 per half day at the very minimum would be what, I think, you would need to have attorneys serve as panel members.

The reluctance, also, in going into Federal arbitration is the same reluctance we are seeing quite often in State courts now in people even going into Federal court at all, even on diversity. There is a great expression right now of opinion from attorneys in Philadelphia that even though it is longer to go into the Court of Common Pleas in Philadelphia, they don't feel as hassled as they are in Federal court. I think this is bad.

You have people who want to get in front of a certain system. They want to be in front of Federal court. And just as Attorney General Bell has stated, he wants things to come up speedily. Well, the old statement is, justice delayed is justice denied. But speedy justice can also be a denial of justice. If the parties agree that they want to take their time in discovery and not rush through in 120 days, there should be no reason why the Federal court system should put such a limitation on. In this regard, I agree wholeheartedly with Judge Cavanaugh.

The majority of people who come across the justice system now in Philadelphia are coming across it through arbitration. The same will happen in the Federal court when this act, or an act similar to this is passed. They have to be assured that they are getting justice and not being rushed through the system. This is what they see as justice in their own case. The bar and the bench have both been subject to so much criticism in the past that I think we should be doubly sure that litigants do not criticize it more because of the system that is set up.

Most of my other comments are related in my prepared statement. These regard the constitutionality of the disincentives.

In that regard, I was given two legal memorandum prepared by attorneys in Philadelphia for the Federal pilot project regarding this item and the project in general. I would hand them out to the committee for their review.

Senator DeConcini. We would like to have those for the record.

Without objection, the record will remain open for the purpose of inserting these two memorandums.

[Material to be supplied follows:]

MEMORANDUM

To T. W. Flowers.
From R. J. Restrepo.
Date January 10, 1978.
Re Federal arbitration pilot program.

I. INTRODUCTION

If passed, H.R.9778 and the companion Bill, S.2253, both of which are now pending before the respective Judiciary Committees, would authorize federal district courts to promulgate Local Rules establishing the use of arbitration in certain cases where the relief sought consists of money damages not in excess of $50,000. Section 5 of H.R. 9778 states that the arbitration system shall be implemented on a test basis for a three year period "in no fewer than five nor more than eight representative districts to be designated by the Chief Justice

of the United States, after consultation with the Attorney General". Apparently assuming that Congress will pass H.R.9778, the Department of Justice has indicated that the Eastern District of Pennsylvania will be one of the district courts to test the new arbitration program. Consequently, a Local District Court Rule setting forth the arbitration procedure to be used in the Eastern District has been drafted.

The Federal Arbitration Pilot Program raises a number of constitutional questions, including the issue whether the arbitration program would violate a party's Seventh Amendment right to a jury trial. After researching this issue, I have concluded that, because H.R.9778 provides that any party to a suit initially tried before an arbitration panel may request a trial *de novo*, the general procedure set forth in H.R.9778 does not violate any Seventh Amendment mandate. However, I believe that an argument could be made that the preconditions that must be met before a party can seek a trial *de novo* unreasonably restrict that party's right to a jury trial, thereby contravening the Seventh Amendment. Other constitutional issues raised by the Federal Arbitration Pilot Program include the questions whether Congress has the authority to authorize such a system and whether Congress may demand that attorneys, as "officers of the court," act as arbitrators, assuming that the attorneys meet the selection standards set forth in proposed §642 of H.R.9778. As of this date, I have not researched the latter two issues sufficiently enough to reach any conclusions; on completing my research, I will give a memorandum to you on the results of that research.

The Federal Arbitration Pilot Program also raises a number of practical problems that must be confronted in determining whether H.R.9778 will alleviate the problems initially set forth in that Bill. Two of these practical problems are discussed in section III, below. Finally, there are a number of substantive discrepancies between H.R.9778 and the Local Rule; these discrepancies would seem to invalidate certain portions of the Local Rule. See discussion at section IV, below.

II. SEVENTH AMENDMENT PROBLEMS RAISED BY H.R. 9778

The Seventh Amendment states that:

"In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law."

The initial question raised by the application of the Seventh Amendment to the Federal Arbitration Pilot Program is whether the suits initially to be tried before an arbitration panel are "suits at common law," thereby triggering the Seventh Amendment. H.R.9778, §644 sets forth the types of actions to be determined by arbitration. The first specific class of suits that must be submitted to arbitration is suits in which the United States is a party and which are brought pursuant to 40 U.S.C. 270(b), as long as the United States has no monetary interest in the claim and the relief sought does not exceed $50,000.[1] 40 U.S.C. 270(b) pertains to a contractor's right to obtain money based on performance bonds which must be obtained before construction can begin on a government building; suits brought pursuant to this section are brought in the name of the United States on behalf of the contractor(s). The Seventh Amendment applies to actions on performance bonds. See *Fidelity & Casualty Co. of New York* v. *Glen*, 3 F.2d 913 (4th Cir. 1925). See also *Rowan* v. *Howard Sober, Inc.*, 384 F. Supp. 1121 (D. Mich. 1974).

H.R. 9778 sets forth a number of actions where the United States is not a party that must be submitted to arbitration. The first such class of actions to be submitted to arbitration is suits in which the parties consent to arbitration and the relief sought consists of only money damages. Although "consent" or waiver is strictly construed by the courts, *National Acceptance Co.* v. *Myca Products, Inc.*, 381 F. Supp. 269, 270 (W.D. Pa. 1974), parties may waive their right to a jury trial. *Northwest Airlines, Inc.* v. *Air Line Pilots Association,*

[1] H.R. 9778 sets forth only one type of suit that must be arbitrated if the United States is a party to that suit. The Bill also provides that the Attorney General, by regulation, may provide for other types of suits that shall be submitted to arbitration. H.R. 9778, §644(a)(1)(A). Absent regulation or a suit brought pursuant to 40 U.S.C. 270(b), no suit in which the United States is a party may be submitted to arbitration.

373 F.2d 136, 142 (8th Cir.), cert. denied, 389 U.S. (1967). Thus, assuming a valid waiver, the Seventh Amendment would not apply to this first class of actions not involving the United States.

The second class of actions to be arbitrated where the United States is not a party involves suits in which (1) the relief sought consists either only of money damages not in excess of $50,000 or in part of money damages not in excess of $50,000 where the court determines that the non-monetary claims are insubstantial and (2) jurisdiction is based at least partly on 28 U.S.C. §1331 and the action is brought pursuant to 46 U.S.C. 688. The first prerequisite set forth in the immediately preceding sentence applies not only to this second class of actions not involving the United States, but also to two further classes of actions that will be discussed below. This first prerequisite does not remove any types of actions from the strictures of the Seventh Amendment because such actions for monetary relief fall within the definition of "suits at common law". Suits for actual and punitive damages are a traditional form of relief offered in courts of law at common law. *Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974); *Curtis v. Loether*, 415 U.S. 189, 196 (1974). Furthermore, although the Seventh Amendment is inapplicable where "recovery of money damages is an incident to [non-legal] relief," [*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48049 (1937)], this exception does not apply to the Arbitration Bill because that Bill provides for mandatory arbitration only where the non-legal relief is an incident to the recovery of money damages.

Having reached the conclusion that the first prerequisite to mandatory, as opposed to consented-to, arbitration does not remove any class of actions from the application of the Seventh Amendment, the question then becomes whether actions pursuant to 28 U.S.C. §1331 where the action is brought pursuant to 46 U.S.C. 688 trigger the Seventh Amendment. 46 U.S.C. 688 provides for recovery for injury to or death of seamen where the injury or death occurs "in the course of his employment." The Seventh Amendment does not apply to admiralty cases. *Curtis* v. *Loether*, *supra*, 415 U.S. at 193 (1974); *Parsons* v. *Bedford*, 3 Pet. 443, 446–47 (1830). However, cases brought pursuant to 46 U.S.C. 688 could only be considered admiralty cases if the action involved injuries or death occurring upon the navigable waters of the United States. *Crowell v. Benson*, 285 U.S. 22, 39 (1931). The test of whether a seamen is entitled to recover under 46 U.S.C. 688 is not whether the injury occurred on navigable waters, but rather whether the seaman was injured in the course of his employment. *Braen* v. *Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1960). Thus, where an action is brought pursuant to this section and the injury did not occur on navigable waters, the Seventh Amendment right to a jury trial would apply. Finally, the fact that jurisdiction over this type of action must be based on 28 U.S.C. §1331 (i.e. federal question jurisdiction) does not mean that the Seventh Amendment would not apply.

The second class of actions for which arbitration is required involves not only the first prerequisite mentioned above but also that jurisdiction is based on 28 U.S.C. §1331 or §1332 and the action is based on a negotiable instrument or contract. Again, the jurisdictional basis, whether federal question or diversity, does not preclude the application of the Seventh Amendment. Rather, one must look to the type of action and the type of relief sought to determine the application of the Seventh Amendment. See *Pernell* v. *Southall Realty*, *supra*, 416 U.S. at 375; *Curtis* v. *Loether*, 415 U.S. at 196. Because this second class of actions for which arbitration is required involves monetary damages, *Curtis* and *Pernell* mandate that the parties jury right be preserved. See also *Rowan* v. *Howard Sober, Inc.*, 384 F. Supp. 1121 (D. Mich. 1974) (Seventh Amendment applies to contract actions).

The third class of mandatory arbitration actions are actions in which jurisdiction is based on 28 U.S.C. §1332 or §1333 and the action is for personal injury or property damage. Where jurisdiction is based on §1332, the Seventh Amendment would apply to actions for personal injury or property damage. See *Curtis* v. *Loether*, *supra*, 415 U.S. at 195 (1974) (Seventh Amendment applies to tort actions). However, §1331 involves admiralty cases; therefore, for the reasons discussed above in conjunction with admiralty cases, the Seventh Amendment would not apply to the latter class of actions.

As is obvious from the above discussion, the Seventh Amendment would apply to most of the classes of actions to be submitted to arbitration pursuant

to H.R. 9778 because they fall within the definition of "suits at common law". The next issue is whether H.R. 9778 in fact preserves "the right of trial by jury". It should be noted that even where jurisdiction is based on diversity of citizenship, this issue must be decided according to federal law. *Kerr-McKee Corp.* v. *Bokum Corp.*, 453 F.2d 1967 (10th Cir. 1972). A problem arises, however, in that this issue is rarely discussed in the federal courts because, as far as I could determne, this is the first time that a mandatory arbitration system has been established within the federal government. Moreover, federal courts rarely consider this issue because the Seventh Amendment does not apply to the States, a number of which have implemented mandatory arbitration statutes. This Seventh Amendment issue has arisen in the federal courts when a party has contested the right of a congressionally-created administrative agency to levy monetary penalties without requiring a jury trial. Such claims generally have not met with success. See, e.g., *Atlas Roofing Co., Inc.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). However, these cases do not apply to the Seventh Amendment issue raised by H.R. 9778 because, as the United States Supreme Court stated in *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) :

"We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. Congress has not seen fit to do so, however, but rather provided that actions under § 161501 be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction. Where it has done so and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial." 416 U.S. at 383.

The only federal case dealing with an issue closely analogous to the issue raised by H. R. 9778 is *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899). Essentially, in *Capital Traction*, the Court held that a party's Seventh Amendment to a jury trial was preserved where the initial hearing was before a justice of the peace, which was not a court of record, as long as the party had a right to a trial *de novo* and the trial *de novo* was a jury trial. 174 U.S. at 45. Furthermore, the Court held that this right was preserved despite the fact that the party appealing the justice of the peace's determination had to give a bond with surety to prosecute the appeal. 174 U.S. at 23. Thus, the Court held that:

"Having regard to the principles and to the precedents applicable to this subject, we should not be warranted in declaring that the act of Congress of 1895 so unreasonably obstructs the right of trial by jury that it must for this reason be held to be unconstitutional and void." 174 U.S. at 45.

In reaching this conclusion, the Court cited and discussed a number of state supreme court decisions reaching the same result. The application of the Seventh Amendment specifically was tested in this case even though the Act of Congress under consideration applied to the District of Columbia because the Seventh Amendment does apply to the District of Columbia, as opposed to the states. See *Capital Traction Co.* v. *Hof, supra; Pernell* v. *Southall Realty, supra*, 416 U.S. at 370 (1974).

One portion of the opinion in *Capital Traction* that supports both the purposes and effort of H. R. 9778 is the Court's statement that:

"The Legislature, in distributing the judicial power between courts of record, on the one hand, and justices of the peace or other subordinate magistrates, on the other, with a view to prevent unnecessary delay and unreasonable expense, must have a considerable discretion, whenever in its opinion, because of general increase in litigation, or other change or circumstances, the interest and convenience of the public require it to enlarge within reasonable bounds the pecuniary amounts of the classes of claims entrusted in the first instance to the decision of justices of the peace, provided always the right of trial by jury is not taken away in any case in which it is secured by the Constitution." 174 U.S. at 44–45.

To summarize the above discussion, H.R. 9778 at least in principle preserves a party's Seventh Amendment to a jury trial by allowing any party to seek a trial *de novo*. This is the same conclusion reached by the Pennsylvania Supreme Court in upholding the Commonwealth's mandatory arbitration program. See *Smith* case, 381 Pa. 220 (1955). In *Smith* case, the court held that:

"In the *Capital Traction Co.* case it was said (p. 23) : 'It [the Constitution] does not prescribe at what state of an action a trial by jury must, if demanded,

be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it.' The only purpose of the Constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined." 381 Pa. at 230–31 (emphasis supplied by court).

This decision, as well as other State decisions upholding mandatory arbitration statutes in light of State constitutional provisions for the preservation of the right to trial by jury are relevant because, as the Court stated in *Capital Traction Co*:

"In passing upon these questions, the judicial decisions and the settled practice in the several States are entitled to great way, inasmuch as the constitution of all of them has secured the right of trial by jury in civil action. . . ." 174 U.S. at 45.

Thus, in broad terms, H.R. 9778 in fact preserves a party's right to a jury trial because it allows any party to seek a trial *de novo*. However, H.R. 9778, §648(d) also places certain limitations on a party's right to seek a trial *de novo*:

"If the party who demanded a trial *de novo* fails to obtain a judgment in the District Court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the costs of the arbitration proceeding, including the amount of the arbitration fees, and—(1) if he is a plaintiff and the arbitration award were in his favor, he shall pay to the court an amount equivalent to interest on the arbitration award from the time it was filed; or (2) if he is a defendant, he shall pay to the plaintiff interest on the arbitration award from the time it was filed."

The question then arises whether these penalties unreasonably obstruct the right of trial by jury. See *Traction* v. *Hof*, supra, 174 U.S. at 45 (1899).

As the Pennsylvania Supreme Court stated in *Smith* case, *supra*:

"* * * All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable. As to what amounts to such a forbidden restriction, it has been held that the constitutional provision is not violated by an appeal in order to obtain a jury trial: *McDonald* v. *Schell*, 6 S. & R. 239; nor by a requirement of giving bail for the payment of costs accrued and to accrue or for the performance of some other duty: *Haines* v. *Levin*, 51 Pa. 412; *Commonwealth, for use*, v. *McCann & Co.*, 174 Pa, 19, 34 A. 299; nor by a requirement of furnishing security for the prosecution of the appeal and satisfaction of the final judgment: *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 23, 43–45; (footnote omitted) nor by a requirement of the payment of a jury fee in advance of trial: *Gottschall* v. *Campbell*, 234 Pa. 347, 361, 83 A. 286, 291. There can be no valid objection, therefore, to the provisions of the Act of 1836, unchanged by the Act of 1952, regarding the payment of the accrued costs and the giving of a recognizance for the payment of the costs to accrue in the appellate proceedings as the condition of the allowance of an appeal from the award of the arbitrators." 381 Pa. at 231.

These and other cases would seem to indicate that the assessment of the costs of the arbitration proceeding in and of itself would not unreasonably obstruct a party's right to a jury trial. However, I could find no case supporting the imposition of interest charges on the losing party. In my view, however, this penalty is analogous to the requirement that an appellant's attorney make an oath that the appeal is not for the purpose of delay and that injustice was done as a result of the arbitration award. This prerequisite to a trial *de novo* has been held to be the type of undesirable, burdensome and onerous restriction constitutionally infirm under *Smith* case. *Dickerson* v. *Hudson*, 223 Pa. Super. 415, 423 (1973). I believe that this same prerequisite has existed in other States, and I will have to research the state of the law in these other States to determine whether this prerequisite is considered unreasonably obstructive to a party's jury trial right in States other than Pennsylvania.

I did find two United States Supreme Court decisions holding that a State's mandatory arbitration system relating to certain employment matters violated the due process clause of the Fourteenth Amendment. See *Dorchy* v. *Kansas*, 264 U.S. 286, 289 (1924); *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas*, w62 U.S. 522, 534 (1923). However, these cases are

distinguishable in that the State of Kansas did allow any party the right of a trial *de novo*. Thus, the holding in these cases would not apply to H. R. 9778. See *Smith* case, supra, 381 Pa. at 230.

Finally, §646(c) of H.R. 9778 provides that:

"The Federal Rules of Evidence may be used as guides to the admissibility of evidence in an arbitration hearing. Notwithstanding the provisions of the Federal Rules of Evidence, relevant evidence that is not privileged may be admitted in an arbitration hearing."

This provision should not affect the constitutionality of the Bill. In a similar situation, the United States Supreme Court stated that the fact that a deputy commissioner was not bound by rules of evidence which would apply to trials in a court or by technical rules of procedure did not invalidate the proceeding, provided that the substantive rights of the parties were not infringed. *Cromwell* v. *Benson*, 285 U.S. 22, 48 (1932).

III. PRACTICAL PROBLEMS WITH H.R. 9778

Section 648(b) of H.R. 9778 states that:

"Upon a demand for a trial *de novo*, the action shall be placed in the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate."

The effect of this provision should be the same as Pennsylvania law, 5 P. S. §71, which states:

"All appeals shall be *de novo*."

At least in Allegheny County in Pennsylvania, the local court had adopted a rule providing, essentially, that absent good cause, a party could not present any witness at the jury trial which the party did not present at the time of arbitration. The Pennsyvlania Supreme Court has held, however, that this rule conflicts with the Arbitration Act because it limits a party's stated right to a trial *de novo*. *Weber* v. *Lynch*, —— Pa. ——, 375 A.2d 1278, 1282–83 (1977). In reaching this conclusion, the court cited an earlier Pennsylvania Supreme Court decision overruling a defendant's Motion to strike the plaintiff's appeal from an arbitration award on the ground that the plaintiff had failed to offer any testimony or even appear before the arbitrators. *Sipe* v. *Pennsylvania Railroad Company*, 219 Pa. 210, 214–15 (1908). There is no reason that these holdings should not apply to cases submitted to mandatory arbitration pursuant to H.R. 9778.

Some of the responses we have received to your request for comments on the Federal Arbitration Pilot Program indicate that plaintiffs might use the arbitration systems as a means of discovering the strength of a particular defendant's case. Furthermore, if a defendant at a trial *de novo* does not obtain a judgment more favorable to him than the arbitration award, he will have to pay interest on that initial arbitration award. These two factors combined may lead to a strategy whereby a defendant either would not appear at the arbitration or, pursuant to a subpoena, would appear but might have little interest in presenting his best case if the amount in controversy is substantial. The defendant might follow this strategy because he does not want to disclose to the plaintiff how he would proceed at trial and, because he is not putting on his strongest case, there is less likelihood that he would not obtain a more favorable judgment in the District Court, thereby precluding his need to pay any interest on the arbitration award. Although the Pennsylvania cases cited above do not confront the issue whether the Legislature could impose restrictions on the evidence or testimony introduced at the trial *de novo* based on what was introduced at the arbitration, the cases cited in §II above of this memorandum would seem to indicate that the Legislature could not limit the scope of a party's *de novo* trial without infringing on that party's Seventh Amendment rights. Thus, in at least some cases, it might be more advantageous for a party to avoid arbitration even though his case initially would be submitted to an arbitration panel.

Another practical problem that exists is that H.R. 9778 requires arbitration where the relief sought consists of money damages up to $50,000. In *Smith* case, the court stated that the appeal rate where jurisdiction was limited to claims not in excess of $1,000 was 5%. In *Dickerson* v. *Hudson*, *supra*, 223 Pa. Super. at 424, however, the court noted that the appeal rate was 15% in

Philadelphia County. The court stated that the higher appeal rate probably occurred because of the higher jurisdictional amount ($10,000). Again, under H. R. 9788, the jurisdictional limit is $50,000. Thus, the appeal rate probably would be even more significant, requiring many parties to incur the costs of going through at least two trials. In this context, it should also be noted that the jurisdictional limit is phrased in terms of "relief sought". The bill does not indicate whether this phrase is equivalent to "amount in controversy" or whether it relates merely to the amount of damages sought by the party bringing the action. If the latter construction is the proper one, this would exacerbate the appeal problem noted above.

IV. DISCREPANCIES BETWEEN H.R. 9778 AND THE LOCAL RULE

If enacted, 28 U.S.C. §641 would state that:

"A United States District Court *may* authorize by local rule the use of arbitration *in accordance with* the provisions of this chapter." (Emphasis added)

This provision on its face requires that any local rule comply with the terms of H.R. 9778, unless that Bill grants the District Court discretion to do otherwise. Despite this fact, there are some major discrepancies between H. R. 19778 and the Local Rule.

One of the major discrepancies involves the potential penalty levied upon a party for seeking a trial *de novo*. Section 648(d) of H. R. 9778 provides that:

"If the party who demanded a trial *de novo* fails to obtain a judgment in the District Court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the amount of the arbitration fees and, if he is a defendant, he shall pay to the plaintiff interest on the arbitration award from the time it was filed at the current legal rate of interest."

The Local Rule, which is blatantly more favorable to the plaintiff than H.R. 9778, exceeds the authority granted to the Eastern District by H.R. 9778. Furthermore, the two sections quoted above vary with respect to the imposition of arbitration costs.

Another significant difference between H.R. 9778 and the Local Rule relates to the compensation to be paid arbitrators. Section 643 of H.R. 9778 provides that the Local District Court has the discretion to determine arbitration service fees, but that fee is not to exceed $50. Section 643 also provides that the Director of the Administrative Office of the United States Courts shall prescribe regulations pursuant to which he *shall* reimburse arbitrators for actual expenses necessarily incurred by them in the performance of their duties as arbitrators. The provision goes on to enumerate certain expenses that might be reimbursed, but states that no reimbursement shall be made for any portion of the expense incurred for the procurement of office space. The Local Rule, however, provides that the Chairman of the Arbitration Panel shall be compensated at the rate of $70 per case, while the other two arbitrators on the panel are to receive $40 per case. According to H.R. 9778, the Eastern District may compensate the non-chairman arbitrators at the rate of $40, but the $70 rate to be paid the Chairman would have to be lowered to at least $50. Furthermore, the Local Rule appears to contravene Section 643(b) of H.R. 9778, in that it states:

"Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this Rule."

Other minor discrepancies include the following: Section 642(b) of H.R. 9778 allows a person to qualify as an arbitrator if he has been for at least five years a member of the Bar of the highest court of the State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or the Canal Zone. Local Rule Section 1(b), however, states that a person may qualify as an arbitrator only if he has been for at least five years a member of the Bar of the highest court of the State or the District of Columbia. The Local Rule also contains what is probably a typographical error in §1(c), in that it states that an arbitrator shall take the oath prescribed in 28 U.S.C. §456, while H.R. 9778 states that an arbitrator shall take the oath prescribed by §453. Section 453 is the proper section, in that it relates to reimbursement for a judge's travelling expenses. There are also variations in wording between §645(a) of H.R. 9778 and §4(a) of the Local Rule; these variations manifest a slightly different procedure for referring some matters to arbitration, but there is no substantive difference that I can discern.

Section 4(a)(2) of the Local Rule does state that, to avoid arbitration, a party must file a certification that the damages recoverable exceed $50,000, exclusive of interest and costs. The court may disregard this certification and require arbitration if it is satisfied that the recoverable damages do not exceed $50,000. A similar provision is not contained in H.R. 9778, but this modification would seem to be within the local district court's power.

V. CONCLUSION

Although a few of the types of cases to be submitted to arbitration do not trigger the Seventh Amendment, most of the classes of cases to be submitted to mandatory arbitration, in fact, are subject to the Seventh Amendment mandate. Theoretically, at least, the concept of Federal Arbitration of the classes of cases that do trigger the Seventh Amendment does not violate the Seventh Amendment because H.R. 9778 provides that any party may seek a trial *de novo*. On the other hand, an argument could be made that the need for a party who does not obtain a more favorable judgment in the District Court to pay interest unreasonably restricts that party's right to a jury trial. The need to pay the costs of arbitration does not unreasonably obstruct a party's right to a jury trial. Finally, H.R. 9778 does not appear to violate any party's Fifth or Fourteenth Amendment due process rights.

There are also some practical problems with H.R. 9778, including the possibility that in some cases, especially in those cases where the relief requested approached $50,000, it might be more advisable for a party to avoid the arbitration or at least not to present his best case. Furthermore, given the monetary substantialness of the arbitration panel's jurisdiction, a higher appeal level can be expected in the Federal Arbitration Program than that which has existed in State Arbitration Programs, where the jurisdictional level rarely, if ever, exceeds $10,000.

Finally, the discrepancies set forth in Section IV above between H. R. 9778 and the Local Rule relating to mandatory arbitration would seem to invalidate portions of the Local Rule.

INTER-OFFICE MEMORANDUM OF ADLER, BARISH, DANIELS, LEVIN, AND CRESKOFF

Date January 9, 1978.

Re U.S. District Court for Eastern District of Pennsylvania, local district court rule re arbitration

I. RELEVANT STATUTES AND RULES

1. *28 U.S.C. §2071—Rule Making Power Generally.*—The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

2. *28 U.S.C. §2072—Rules of Civil Procedure.*—The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution * * (Emphasis Added).

3. *Rule #38 of the Federal Rules of Civil Procedure—Jury Trial of Right.*—(a) *Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.* (Emphasis Added).

(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party * * *.

4. *Rule #39 of the Federal Rules of Civil Procedure—Trial by Jury or by the Court.*—(a) *By Jury.* When trial by jury has been demanded as provided for in Rule #38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or the statutes of the United States . . .

5. *Rule #83 of the Federal Rules of Civil Procedure—Amendment of Rules.*—Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

6. *Federal House of Representatives Bill No. H.R. #9778.*—"A Bill to amend title #28 of the United States Code to encourage prompt, informal, and inexpensive resolution of civil cases by use of arbitration in United States district courts and for other purposes"—introduced by Congressman Rodino on October 27, 1977, which was referred to the Committee on the Judiciary.

II. AUTHORITY FOR PENNSYLVANIA STATE COURTS TO ESTABLISH COMPULSORY ARBITRATION

A specific Pennsylvania statute, 5 P.S. §30, entitled "Submission to Board of Members of Bar" specifically provides for the compulsory arbitration that is found in many counties, including Philadelphia County, throughout the Commonwealth of Pennsylvania. The statute states in relevant part:

"The several courts of common pleas may be rules of court, provide that all cases which are at issue where the amount in controversy shall be ten thousand dollars ($10,000) or less in counties of the first and second class, second class A and third class and five thousand dollars ($5,000) or less in all other counties, except those involving title to real estate, shall first be submitted to and heard by a board of three (3) members of the bar within the judicial district. . . ." Act of January 14, 1951, Pub. L. 2087, 5 P.S. §30.

The constitutionality of this act was challenged in the *Application of Smith*, 381 Pa. 223, 112 A. 2d 625 (1955). The Court rejected petitioner's contention that the act violated Article I, Section 6 of the Pennsylvania Constitution ["trial by jury shall be as heretofore, and the right thereof remain inviolate"] and the Fourteenth Amendment of the Federal Constitution, stating:

"* * * there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal . . . The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable * * *." 112 A. 2d 629.

Accordingly, the Pennsylvania Supreme Court upheld the authority of the legislature to enact an act which authorized the courts of Pennsylvania to initiate a system of compulsory arbitration through the rule-making process of the courts. Unlike the Pennsylvania State Courts' arbitration procedure, which is authorized by Pennsylvania statute, the United States District Court's proposed arbitration pilot procedure is not based upon any specific grant of authority by either a federal statute or a federal rule.

The Pennsylvania Supreme Court in *Weber* v. *Lynch*, —— Pa. ——, 375 A. 2d 1278 (1977), made it clear that the Pennsylvania arbitration statute would be strictly construed and any local rules of Court which were found to be inconsistent would be held invalid. In *Weber*, the Allegheny County Court of Common Pleas adopted a local rule, which stated that in *de novo* appeals from compulsory arbitration a party was generally restricted from calling witnesses not called in the arbitration hearing. The Supreme Court, in invalidating the local rule, stated:

"* * * Although the Arbitration Act authorizes the several courts of common pleas to establish by rules of court compulsory arbitration of the sort involved instantly, such rules must be consistent with the provisions of the Act and the legislative intent found therein that the system of compulsory arbitration there permitted be relatively uniform throughout the Commonwealth * * *." 375 A. 2d 1281.

It is recognized in both the *Smith* and *Weber* cases that the compulsory arbitration system in the Commonwealth of Pennsylvania is valid only because of the statutory authority given by the enabling legislation. It is also made clear by these cases that any local rules promulgated by the Courts of Common Pleas throughout the Commonwealth of Pennsylvania must be consistent with the enabling Act.

III. AUTHORITY FOR THE FEDERAL DISTRICT COURTS TO ESTABLISH COMPULSORY ARBITRATION SYSTEM

There is no specific Congressional statute which I could find which permits federal district courts to establish compulsory arbitration systems. In fact, Bill H.R. 9778 was introduced into the House of Representatives on October 27, 1977, by Congressman Rodino, entitled "A Bill to amend title 28 of the United States Code to encourage prompt, informal and inexpensive resolution of civil cases by use of arbitration in United States district courts and for other purposes" for that specific purpose. Said bill was referred to the Committee on the Judiciary. It is important to note that the bill in question is almost identical to the proposed local rule entitled "Local District Court Rule—Arbitration" which is the authority upon which the pilot program is to be instituted in the Eastern District of Pennsylvania. Therefore, a very significant argument can be made against the institution of the arbitration system as a pilot program in the Eastern District of Pennsylvania at this time, in that Congress itself realizes that current statutes and rules do not empower the federal courts to initiate a compulsory arbitration system through their local rulemaking procedures, absent appropriate enabling legislation.

Rule 83 of the Federal Rules of Civil Procedure seems to be the only arguable source of authority for the federal courts to institute a compulsory arbitration system. However, Rule 83 must be considered in juxtaposition with 28 U.S.C. §2072 and Federal Rule of Civil Procedure #38. Professors Wright and Miller make it clear in *XII, Federal Practice and Procedure*, Civil, §§3151–3155, Wright and Miller, that Rule #83 was not intended to give the federal courts the power to institute local rules such as the one in question. Professors Wright and Miller state:

"The exception of the draftsmen of Rule 83 was that the power to make local rules would be used only on rare occasions when the Civil Rules deliberately had left gaps to be filled in the light of recognized local needs. Their statements at the institutes that were held at the time the Civil Rules went into effect are very clear to this effect, and it is well established that these statements are entitled to weight on construction of the rules. . . ." (Wright and Miller, *Federal Practice and Procedure*, volume XII, Civil, §3152, p. 218).

Professors Wright and Miller indicated that the draftsmen of Rule #83 considered things such as procedure for admission of attorneys, the day on which motions will be heard and whether to have the Clerk's office open on Saturday morning as the type of matters that would be regulated by local rules. *XII, Federal Practice and Procedure*, Civil, §3152, p. 220, Wright and Miller.

Professors Wright and Miller quote one of the members of the advisory committee on the Federal Rules as to the meaning of the last sentence of Rule 83 that states that "in all cases not provided for by rule, District Courts may regulate their practice in any manner not inconsistent with these rules". The advisory committee member, when referring to this last sentence of Rule 83, stated that it was:

"One of the most important and salutary in the entire set of rules. It closes all gaps in the rules. It puts an end to the whole of the Conformity Act, and it permits judges to decide the unusual or minor procedural problems that arise in any system of jurisprudence in the light of the circumstances that surround them and of the justice of the case without the complications and injustice that must attend attempts to forecast the situations and to regulate them in advance either by general or by local rule . . . I am interested in this subject because

I have heard a rumor—yes, more than a rumor—that some district courts are making too many rules. I hope that the district judges will realize the significance of this last sentence of Rule #83 and understand that local district court rules on other than purely local matters of detail may impair the useful power intended to be vested in them by that sentence." (Wright and Miller, *Federal Practice and Procedure*, volume XII, Civil, §3155, p. 242–243, *quoting* statement of Edgar Tolman, Proceedings, Washington Institute on the Federal Rules, 1938, p. 129).

One notable decision is *Miner* v. *Atlass*, 363 U.S. 641, 80 S. Ct. 1300, 4 L.Ed. 1462 (1960). In *Miner*, the United States Supreme Court was considering whether a local rule which authorized the taking of depositions for discovery purposes in admiralty proceedings was valid under the admiralty law in effect at the time. The significance of the *Miner* decision on the issue presented herein becomes abundantly clear upon a closer examination of admiralty Rule 44:

"Right of trial courts to make rules of practice—in suits in admiralty in all cases not provided for by these rules or by statute, district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

Rule 44 is very similar to Rule 83. The United States Supreme Court in invalidating a local rule which permitted depositions for discovery purposes stated:

"* * * Rather, the matter is one which, though concededly 'procedural', may be of as great importance to litigants as many a 'substantive' doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally been highly esteemed.

"The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule—making power of the Court, * * * designed to insure *that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.* Having already concluded that the discovery—deposition procedure—is not authorized by the General Admiralty Rules themselves, *we should hesitate to construe General Rule #44 as permitting a change so basic as this to be effectuated through the local rule making power, especially when that course was never reported to Congress, as is now required under 28 U.S.C. §2070,*" (363 U.S. 649–650—Emphasis Added).

It would seem that the reasoning in *Miner* would preclude such a basic procedural innovation in the federal courts as compulsory arbitration, by use of the local rule making function of the United States District Courts under Rule 83. Rather, such an innovation would require either a specific statute or the detailed procedure required for the promulgation of a Federal Rule of Civil Procedure.

We would be amiss, however, if the case of *Colgrove* v. *Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed. 522 (1973) were not considered in this discussion. In *Colgrove*, the United States Supreme Court upheld a local rule which provided that a jury for the trial of civil cases shall consist of six persons. The Supreme Court held that the local rule was valid under Rule 83 and was not inconsistent with 28 U.S.C. §2071, 28 U.S.C. §2072 or Federal Rule of Civil Procedure #38. The Court held that a twelve man jury is not absolutely required under the Constitution. All that is required is that a jury of whatever size be impaneled to decide the issues of fact. What the Court's decision in *Colgrove* does to the reasoning in *Miner* is unclear. However, it would seem that the reasoning of *Miner* would still be persuasive, and that such an innovative procedure as compulsory arbitration should not be "experimented with" on the bases of Rule 83 and the local rule-making process of the District Courts, but should be bottomed either upon an Act of Congress or a new Federal Rule of Civil Procedure promulgated by the United States Supreme Court, with all of the built in safeguards that Congressional hearings, testimony, committee study, input from various lawyers' organizations and general informed public reaction afford under such circumstances.

Senator DeConcini. Let me address a couple of questions to you. In the arbitration that I have been involved in through the Amer-

ican Arbitration Association, certainly the rules of evidence and the rules of procedure are not strictly followed. Do you think that is any handicap for the nontrial lawyer to then be an arbitrator when he is geared up and educated to go by certain rules?

Mr. GORDON. I have found that to be such; yes. The American type of arbitration cases that I have tried mostly have been uninsured motorists' claims under an arbitration provision in the insurance policy. In these cases, only attorneys, and usually trial attorneys, are listed. The arbitration association provides a list of plaintiffs' attorneys, defendants' attorneys, and neutrals. Each side has a right to strike a certain amount of attorneys. This system is far superior, I think, than just appointing arbitrators because you have some choice in your selection. Whether administratively it could be built into this system is questionable. We have considered this in Philadelphia and find that the cost of administering this type of system would be prohibitive.

The amount of cases you will have in Federal court would not be as extensive as what we have in Philadelphia, and such a system could be provided. This basically gets your litigators in as arbitrators.

Senator DECONCINI. That is a very specialized area you are talking about.

Mr. GORDON. It involves, basically, personal injury claims. Those are the great majority of the cases that are going to be heard.

In fact, I think the opinion of most members of the bar is that they strike mostly the neutrals off. They don't have the experience. And even if they are the plaintiff, they prefer three defense men there who understand the problems.

Senator DECONCINI. I don't know if you were here when Judge Bell gave his testimony.

Mr. GORDON. Yes; I was.

Senator DECONCINI. He made some reference to the obligation and duty of the bar to come forward. Do you care to comment on that, all in relation to the $50 figure?

Mr. GORDON. I agree that it is the duty of the bar to come forward. I know that I serve, and a number of other people serve, gratis with the American Arbitration Association. Once you do set up a fee, I think members of the bar expect that it should not be a nominal fee. They would rather have either gratis or a regular fee for the service.

Of course, even if you set up a higher fee than the $50, you are certainly not going to be paying them fully for their time. The general billing out of attorneys' fees right now in the city of Philadelphia is somewhere between $60 and $100 an hour. Obviously, you are not going to pay a fee somewhere in that range.

But certainly we are getting a problem now in Philadelphia with busy attorneys serving. Not that the fee is going to make a difference, but it might make some difference. That is, not getting your busy attorneys, but your second-line trial litigants in.

Senator DECONCINI. You would opt for a fee rather than no fee?

Mr. GORDON. Yes. What we have in Philadelphia now in the average case is an hour to 2 hours. We have a rule where all medical bills, reports, wage loss information, et cetera are submitted ahead of

time. They are looked at by the attorneys and we don't have to have testimony in that regard. There is nothing in this act that would provide specifically for this.

Senator DeConcini. But the arbitrator would still have to read all that. You are talking about the average time that he actually sits in the hearing.

Mr. Gordon. Yes; 1½ hours or 2 hours just sitting there.

I can't foresee any case under this act up to $50,000 taking less than a day and possibly 2 days or more. To expect him to take time out from a busy schedule, especially when the Federal courts are pushing so tremendously on the attorneys to complete their discovery and get their cases up, it is an additional burden. This is why I say that people are not going into the Federal courts any more.

Senator DeConcini. Mr. Gordon, do you think there is any need for rules of arbitration?

Mr. Gordon. We do have a specific set of rules in Philadelphia. They are attached to my statement and are quite detailed.

Senator DeConcini. Are those rules subject to appeal if one of the parties before you objects to admitting something that is in opposition to their interpretation of the rules? Just how binding are those rules?

Mr. Gordon. They are basically administrative rules. There are certain rules in regard to the acceptance of evidence as well as rules with regard to appeals.

Senator DeConcini. What about the procedural aspect?

Mr. Gordon. The procedure is that the arbitrators are the supreme judge of the case as it appears before them.

Senator DeConcini. Do you see any reason to change that?

Mr. Gordon. No. There is a judge supervising arbitration who is always available. If a specific problem comes up and people feel they need an immediate ruling, he is available. I have never seen it happen in the course of a hearing.

Senator DeConcini. Do you think there should be, if we move into this area, the Federal area, that there should be any Federal rule for arbitration?

Mr. Gordon. I think there should be a general set of rules. You cannot limit the panel too greatly since you want to alleviate the formality in order to speed up the process. As long as there is a supervising judge who is available, I think this would be adequate.

Senator DeConcini. Thank you.

Mr. Altier has several questions.

Mr. Altier?

Mr. Altier. In your statement, you said that you agree with Judge Cavanaugh about the thought of extending or going beyond the 120-day discovery provision in the bill. Do you also agree with Judge Cavanaugh about his comments about providing some sort of certification upon completion of discovery before moving toward arbitration?

Mr. Gordon. Yes, I do. I find this system in Philadelphia has been very successful. No attorney wants to delay a case from trial. He wants to get it up as soon as possible, especially a plaintiff's attorney

who is usually on a contingent fee. In this regard, as soon as discovery is finished, he immediately files a certificate of readiness indicating that discovery is finished. If the other side has an objection, the supervising judge will rule on this.

If it takes longer, there is no reason why we should have any set time that the discovery has to be completed.

Mr. ALTIER. Thank you.

In your prepared statement you indicated that if hearings under the current compulsory arbitration program in Philadelphia consume more than a certain amount of time that the rules should permit additional compensation.

How often is such a request made and what is the court's general reponse to this request?

Mr. GORDON. Such a request in Philadelphia is filed with the supervising judge. It is rare that a case goes much more than 3 hours and up to 3 hours the standard compensation would apply. I would say possibly one out of 50 to 60 cases would go longer, in which case usually additional compensation is awarded at the discretion of the supervising judge in an amount subject to his discretion.

Mr. ALTIER. Is it an hourly rate?

Mr. GORDON. No, it is something that is very informal and usually about 50 percent to 100 percent more than the normal fee.

Mr. ALTIER. In your prepared statement you indicated that there is a bill that is being introduced in Pennsylvania that would authorize an increase of the jurisdictional amount to $20,000. Do you believe that there should be some sort of relationship between the increasing jurisdictional amount and the need for arbitrators to be designated as experts in certain areas to arbitrate types of matters?

Mr. GORDON. Our committee in the bar association is exploring that right now. We hope to have such a system shortly. But, meanwhile, we are at least providing for the amount of years or qualification which is already written into the bill. The question is whether we can do it administratively for a specific qualification.

Mr. ALTIER. Thank you.

Senator DECONCINI. Mr. Gordon, we thank you very much.

We have two further witnesses, Mr. Spangenberg and Mr. Tatelbaum. We are going to have to recess at this time for the full Judiciary Committee to use this room for the Civiletti hearings. If the quorum is gathered, we will be recessed for approximately 1 hour. If a quorum is not gathered, we may be able to reconvene within 20 or 30 minutes. I might ask you two gentlemen if you could stay close by.

Thank you very much.

[Recess taken.]

Senator DECONCINI. The Subcommittee on Improvements in Judicial Machinery will reconvene at this time. We will hear from Mr. Craig Spangenberg, chairman, congressional liaison, Association of Trial Lawyers of America.

Mr. Spangenberg, I am sorry to put you through that delay. I realize your time is valuable and I appreciate your coming to testify before us.

You will please proceed. We can print your entire statement in the record, and you may highlight it, if you prefer.

Mr. SPANGENBERG. In view of the fact, Mr. Chairman, that I have made a statement for the Association of Trial Lawyers on this subject, and I have also appended personal observations from my speech to them to my circuit on the same subject, I would confine myself to some observations about the bill.

Senator DECONCINI. Without objection, your statement will be inserted in its entirety into the record at this point.

[Material follows:]

TESTIMONY OF CRAIG SPANGENBERG, CHAIRMAN, CONGRESSIONAL LIAISON COMMITTEE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. Chairman: Thank you for the opportunity to express the views of the Association of Trial Lawyers of America, generally known as ATLA, on the arbitration system detailed in Senate Bill 2253. My name is Craig Spangenberg, and I am Chairman of the Congressional Liaison Committee of ATLA, which is an organization of some 34,000 members. The membership is composed primarily of trial lawyers, but includes law professors, judges, and others who are interested in the preservation of the adversary trial system in the United States. To some extent I must appear in a dual capacity, and state some individual opinions. As an occasional writer and lecturer on legal matters, I had occasion, in June of 1977, to address the Judicial Conference of the Ninth Judicial Circuit, at its annual meeting, on the subject of the Ohio Plan of Arbitration. A copy of that speech is attached for whatever value it might have on the subject of arbitration generally, and for specific information on a very successful, well tested, mandatory arbitration system for the smaller damage cases which has been operating in Ohio since 1970. The speech itself represents only the personal views of the speaker. Those views must be distinguished from the official policy of ATLA.

The Board of Governors of the Association of Trial Lawyers of America has not considered the general policy, nor the detailed provisions of S.2253. There cannot be an official policy of ATLA without Board approval; but I can state that there are two areas in which the Board has already approved the concept of mandatory arbitration, within defined monetary limits, in certain classes of damage litigation. The conclusion can be deduced that ATLA is not opposed to arbitration as an adjunct to the civil jury trial system, but believes that it will not be useful in the larger cases.

During the period of intense debate over the medical malpractice problem, some three years ago, ATLA published a position paper which said:

"ATLA believes that both the patient and the physician are entitled to assert their respective rights fully in a full judicial proceeding, unless the costs of such a proceeding make it practically unsuitable to the resolution of that dispute. Where the dispute involves a very substantial sum of money, the expenses incurred in a full judicial proceeding are certainly justifiable. However, where the dispute concerns a smaller sum, the expense of a full judicial determination may be excessive. For these reasons, ATLA recommends that consideration be given to mandatory arbitration of any professional liability dispute involving less than $25,000. Arbitration lacks many of the safeguards and equities that are available in a full judicial proceeding. At the same time, arbitration can often provide greater speed and economy through the more informal procedures which are utilized there."

Last year (in July, 1977) ATLA testified on the Product Liability Problem before a subcommittee of the Committee on Small Business of the House of Representatives, and in its testimony said:

"We have recommended, in the past that the mechanism of arbitration was appropriate in handling medical malpractice claims. We would recommend the same thing for product liability. It could well be that the public would be adequately served if all products claims in amounts of less than $25,000 were handled by arbitration rather than by law suits."

These positions were taken with respect to very specific problems in two narrow areas of tort law which do not constitute a substantial percentage of

federal court litigation, but the positions do indicate that a jurisdictional maximum of $25,000 would probably be recommended by ATLA if mandatory arbitration were to be applied to all money-damage civil litigation. At least in the early testing stages of an arbitration plan it would be preferable to start with the smaller cases. If the system proved useful and equitable in practice, then higher limits could be staged in as experience justified the increase.

This brief discussion of jurisdictional amounts brings into focus a significant difference between the federal arbitration plan of S.2253 and the Ohio Plan for its state court arbitration system. In the Ohio plan the case is submitted to mandatory, but nonbinding, arbitration if the case value does not exceed $10,000. The value determination may be made by the trial court judge at any stage of the judicial proceedings. If the judge, after a reasonable inquiry into the injury suffered or the damage sustained concludes that a verdict in excess of $10,000 could not be allowed to stand, then he will assign the case for arbitration even if the prayer of the complaint were $50,000 or the settlement demand were $15,000. This determination can be made at any status call or pre-trial hearing.

Under Section §644(a)(2)(B)(i)(a) the jurisdictional test is whether "the relief sought consists only of money damages not in excess of $50,000, exclusive of interest and costs." It would appear that the prayer of the complaint is the controlling test in determining the amount of "the relief sought." If the plaintiff prays for damages in the amount of $60,000, then the case cannot be ordered to arbitration even though a verdict of more than $20,000 would be almost inconceivable. The size of the prayer of the plaintiff's complaint is not a reliable indicator of the true value of the case, and is usually not an accurate evaluation of the recovery actually sought to be made.

There is another feature of S. 2253 which is certain to raise objection, not only by ATLA, but from a broad range of the trial bar generally. Arbitration may be a useful adjunct to the trial system, but it should not be substituted for the basic right to a jury trial, nor should heavy penalties be placed upon those who choose to reject the arbitration award and demand trial de novo. There are serious constitutional objections if arbitration is mandated as a condition precedent to jury trial, and the parties are then penalized if a jury trial is demanded. The Seventh Amendment states categorically that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The right cannot hardly be said to be preserved, unimpaired, if a heavy tax is laid upon those who seek to assert the constitutional right.

Under Sec. 648 of S.2253, subsection (d), the party who demands trial de novo must pay a penalty, measured by interest on the rejected arbitration award, unless the result of the trial is "more favorable to him than the arbitration award."

Assume a case where the plaintiff seriously believes the average jury trial value of his case is $30,000. The arbitrators find for plaintiff, but award $20,000. Plaintiff elects to demand a jury trial, and two years later wins a verdict for $20,000. The result is not "more favorable", and he must pay a fine to the court measured by two years interest on the $20,000 award. At 6%, the fine will be $2,400, plus another $150 or more for the fees and expense of the arbitration. The penalty will be imposed for any award less than $20,000, including the possibility of a defendant's verdict.

A similar penalty is imposed upon a defendant who does not achieve a "more favorable" result, although in this case the interest payment goes to the plaintiff in the form of preverdict interest. There may be some equity in paying interest to the plaintiff, for the delay he must endure between arbitration award and jury trial. There is no comparable equity in the situation where the defendant has lost the arbitration, but has not had to pay the award because of plaintiff's appeal. The delay is, in general, an advantage to the defendant who retains the use of his money and enjoys its earning power pending the final trial.

I must express a strong personal disagreement with the basic philosophy of the penalty, and even more strongly with the false premise on which it is based. The test stated in S.2253 is whether the jury agrees with the arbitrators. The comparison of the jury award with the arbitrators' award necessarily assumes that the jury verdict is precisely and essentially the true value of

the case. Although average jury verdicts do measure average values in judicial theory, the individual case verdict is by no means a satisfactory standard of a stable true value.

In the only major empirical test of the way in which juries actually function, the University of Chicago's Jury Project researchers put onto tape the testimony from an actual trial, and played that tape to a very large sample of juries. The juries were taken, by lot, from jurors who had appeared for jury duty at county courthouses. In the large series of verdicts based on the same taped testimony, the highest award was $60,000 and the lowest award was $17,500, with an average of $41,000. The range was more than 3 to 1. What may be more surprising is that when the same tape was played to a large group of judges for individual, single-man decision, the lowest award dropped to $8,000 and the highest award increased to $65,000. The range was more than 8 to 1.

The experiment did not necessarily prove that either the jury group or the judge group was right, in any specific decision, or on average. It did prove that a twelve man group decision by the jury was far less erratic than the one man individual decision of a trained judge. It is not known where in the pattern the decision of a three man board of arbitrators might fall. A good guess would be that a decision by a group of three would be more erratic than a group of twelve, and less erratic than a single judge decision.

In any event, there is no statistical evidence to justify the assumption that the jury verdict is a true value standard in a one time only trial. It is unreasonable and unfair to penalize a party if the jury verdict is not "more favorable" than the arbitrator's award. The essential merit of the arbitration system is that it does produce an early decision which the overwhelming majority of litigants do accept. There is no merit in attempting to compel acceptance by artificial pressures.

A final criticism of S. 2253 lies in the amount of the fee to be paid to each arbitrator, which is forbidden to be more than $50 per case. This valuation may be based on the Ohio plan, where the panel chairman receives $50 and the associates receive $40. That plan does work, and trial lawyers do volunteer. They volunteer to sacrifice their time to assist a heavily burdened court system, and with the realization that some effective way must be found to move the small cases to conclusion without much expenditure of judicial man hours. There is reason to doubt whether those same trial lawyers would be as willing to sacrifice additional time for the relief of the federal system.

It must be understood that the informalities of the Ohio system allow almost all the arbitrations to be completed within a few hours, and certainly within a half day. The Ohio system deals with the smaller tort cases, up to $5,000 originally and now up to $10,000 by recent amendment. Most of the trial lawyers are completely familiar, through their daily practice, with the legal principles involved in these cases and need spend no time in legal research or study of briefs.

The same observation is not true of the plan under S.2253. Arbitration is mandated for Miller Act cases, under 40 U.S.C. 270 (b), where the contract dispute is up to $50,000. Such cases may involve thorny questions of contract, surety, and indemnity law and many hundreds of pages of documentary evidence. In cases where the United States is not a party, the cases for arbitration include Jones Act and Federal Employers Liability Act cases, negotiable instrument cases, and the general run of diversity tort actions for personal injury or property damage. An arbitration, similar to the Ohio plan, could well handle the Jones Act and FELA cases. These cases tend to be concentrated in the hands of relatively few specialists so that there may be some difficulty in obtaining the requisite number of impartial arbitrators who are familiar with the applicable law and practice. If the qualified arbitrators are available, however, a half day might be adequate for most of the arbitrations. Negotiable instrument disputes might be far more complex, depending on the nature of the defenses, and would drive the arbitrators to their libraries.

Diversity tort cases tend to be legally simple, involving chiefly factual disputes. The smaller cases could well be arbitrated, but cases involving a value of $50,000 are hardly considered small. Furthermore, the diversity tort cases are clearly not the cause of docket congestion and delay in federal district courts. The statistics appended to my speech to the Ninth Circuit

speak for themselves. In the last decade tort case filings in the federal system have decreased by 8%. There has been a tremendous increase up to 900 plus percent in civil rights cases and social security cases, and massive increases in prisoner petitions, labor cases, anti-trust cases, and contract cases. The proposed federal arbitration plan does not reach the real cause of docket congestion.

There seems to be no motivation for the tort case trial bar to donate their time, for an absurdly low fee, to make more room for those specialty cases which are the real cause of court congestion. There will be even less reason to expect a donation of service to the federal district court system if congress restricts or abolishes diversity jurisdiction altogether. Successful arbitration of diversity cases requires, first, that there be diversity cases; and second, that there be an adequate number of practitioners at the federal bar who are qualified and competent to deal readily with the arbitration of those cases. The arbitration system also requires that there be mutual trust and respect between the bench and the bar, so that the bar will be willing in all friendship to give its assistance to the burdened judges of the bench. That friendly assistance should not be compelled, nor should it be grossly underpaid.

THE OHIO ARBITRATION SYSTEM

The Ohio Plan of Arbitration is designed to dispose of a large class of cases involving relatively small money damage with a minimum expenditure of judge time and judicial costs. The arbitration system is court related and court supervised, is mandatory, but is not binding nor conclusive. It is effective. Only 1.5 percent of all cases ordered into arbitration are ever tried to a jury on appeal de novo.

The arbitrators are all trial lawyers, who sit as a panel of three with decision by majority vote of any two of the three. They render an award for plaintiff or defendant, and determine the amount of damages, but do not make a formal finding of facts or render an opinion. The lawyer arbitrators are all volunteers, who receive only a minimal fee for their services. The system presupposes the active cooperation of the trial bar, who do in fact give the program full support.

The members of the bar file a consent to serve with the Arbitration Commissioner. They may withdraw from the list at any time. The Administrative Judge divides the list of eligible arbitrators into three sections. The first section is composed of lawyers with considerable trial experience and seasoning. The chairman of the three man panel is appointed from this list. The second section of the list is composed of lawyers whose practice is chiefly on the plaintiff's side, and the third section comprises lawyers whose practice is chiefly defense. The three man panel is drawn in alphabetical order, one from each of the three lists. Each panel is assigned three cases to handle, at the time it is formed, in the present version of the rule. Inasmuch as the total number of names on each list is different, the rotational selection of the panel makes it extremely unlikely that the identical three man panel will ever be reappointed.

The panel chairman arranges the time and place of the hearing within 30 days of the assignment. The hearing is usually held in a conference room in his office. The panel does have power, through the court, to issue subpoenas for records and witnesses; but voluntary production by the parties is strongly encouraged and subpoena power is rarely used. Hearings are orderly, but not overly formal. It is an unwritten rule that the whole hearing should be concluded within two hours, including concise opening statements, testimony, presentation of documents, and brief final arguments. Medical and hospital records and repair estimates are normally stipulated. Doctors' reports are normally used in lieu of depositions. A two-thirds majority of the arbitrators may determine admissibility of evidence, and strict rules of evidence are not mandatory.

The arbitrators discuss, argue, and decide the case at the conclusion of the hearing and usually announce the decision to the parties at that time. In any event, a written Award must be filed with the court, with copies to the parties, within 30 days. This Award converts into a final judgment unless an Appeal de Novo is filed within 30 days.

The appeal reinstates the case on the court's docket for regular jury trial. There is a moderate financial penalty. On filing the appeal, the appellant must

repay the arbitration fee of $110 ($50 to the Chairman and $30 each to the other two members) together with an appeal fee of $20. However, an indigent may appeal without cost by filing a poverty affidavit. The repayment of the arbitration panel cost is not taxed as court costs in the case itself, and is not recoverable by the appellant if his appeal is successful.

In the jury trial itself, after appeal, the finding of the arbitration is not admissible in evidence. The arbitrators themselves may not be called as witnesses to testify as to admissions or contrary statements made before them. In short, the arbitration hearing itself is sealed with privilege—which encourages open and candid hearings.

A case is assigned to the arbitration list by the judge, to whom the case is assigned under the individual docket system, at the first pre-trial. This occurs after a reasonable time for discovery has elapsed. The parties may themselves agree to put the case on the arbitration docket at any time, but this rarely happens. Under the initial version of the rule the case was necessarily assigned to arbitration whenever the pre-trial judge decided, in his discretion, that the actual amount in controversy exceeded $5,000 exclusive of interest and costs. This is not the amount in suit, nor the amount claimed in settlement, but the amount which would reflect a high verdict value for the case. The success of the program has caused the court to amend its rules and to increase the determining case value to $10,000, as of February 28, 1977, applicable to cases assigned after that date. The power of the arbitrators is limited to awarding not more than the jurisdictional limit of the old $5,000 or the present $10,000 per case. However, where the case involves multiple claimants or cross-claims the court may in its assignment order specify that the arbitrators may award an amount not to exceed the $5,000 (or the $10,000) limit per claimant or cross-claimant, regardless of the total amount of awards. Cases of higher value may also be assigned by unanimous consent.

The arbitrators are mandated not to attempt settlement, nor to inquire as to the offers or counteroffers which may have been made. Their function is solely decisional. The parties are, of course, encouraged to settle the case before arbitration, and more particularly before the 48 hour period preceding the time set for the arbitration hearing. The arbitrators receive no fee if the case is settled more than two days before the hearing. If the case is settled within that two day period, then the arbitrators must send the settlement notice to the court, in the form of a Settled and Dismissed Award, and the arbitrators receive the standard fee.

How does the system perform in actual practice? It began in May of 1970, and cumulative results through May of 1977 are available. In seven years of experience 10,347 cases have been assigned to an Arbitration Panel and have gone on to final disposition. Of this group, 2,734 cases, or 26.4 percent of the total were settled and dismissed before the two day deadline before scheduled hearing, and no direct arbitration costs were incurred.

A second group of 1,385 cases were settled within the two day period, and awards were filed "Settled and Dismissed", with fees paid to the arbitrators. These cases comprise 13.4 percent of the total assignments, making a settlement or other disposition total of 39.8 percent before actual hearing.

A total of 6,228 cases have been heard and decided by the Arbitration Panels. These comprise 60.2 percent of all cases assigned. Awards for the plaintiff were made in 4,187 cases, or about 67 percent of the decided cases. Awards for the defendant were made in 2,041 cases, or 33% of those decided by the panels. These percentages are in fairly close agreement with the ratios of jury decisions in personal injury cases.

A total of 4,615 cases ended at Award, with no further action. In other words, the Award was accepted in 75.1 percent of all cases decided. In the other 24.9 percent of the decided cases, an Appeal de Novo was filed and costs were paid. The majority of the appeals were taken by insured defendants, with the appeal apparently used as means for further bargaining. The cases appealed were settled before a jury trial in 90.4 percent of all instances. In the 1,613 appeals de novo, 1,457 cases were settled with appeals dismissed. Only 156 cases were tried to verdict. In the 1,613 appeals, some 80.6 percent or 1,300 cases were settled before being called for trial. This left only 313 appealed Awards to be called for trial, and half of these, or 157 cases, were settled after trial call and before verdict. The final result was that jury trials to verdict

were had in only 156 cases, which amounts to 9.6 percent of all appeals, or 2.5 percent of all Awards decided; or only 1.5 percent of all cases assigned to the arbitration system.

The total cost of arbitrators' fees, which are paid out of county funds, has averaged $50.97 per case instead of the scheduled $110 per case, due to the large number of settlements without fee and due to the recapture of the fees paid in the cases appealed. There are, of course, additional costs for the salary of the Arbitration Commissioner and other indirect and overhead costs. The cost is deemed modest in view of the fact that the arbitration system handled 14.1 percent of the Civil Docket at the $5,000 maximum limit, and will handle considerably more than that with the new maximum limit of $10,000.

The system described was instituted by the County Court in Cuyahoga County, which comprises the Cleveland metropolitan area—the most populous and litigious district in the State. The early results were so successful that the Supreme Court of Ohio promulgated a Rule of Superintendence specifically authorizing any County Court in the state to adopt a similar plan. The Rule ended any question as to the power of the Cuyahoga County Court to continue its plan. Since that time the plan has been adopted in Hamilton County, which is the Cincinnati area, beginning in 1972. Results have been quite similar in percentage, although the total number of cases is a lesser amount in all categories. The plan is also in effect in some of the smaller counties, such as Richland and Stark, which include the cities of Mansfield and Canton respectively. In general, the plan was adopted to reduce delay in congested docket areas, and it has produced the intended effect of reducing congestion.

Why does the plan work? There is no magic in it, and no great compulsion. It works because of some easily identifiable human factors. First of all, it is the lawyers for the parties who settle cases. They are busy, and constricted with crowded and conflicting schedules. They do not meet to concentrate on the same file and appraise its value until some scheduled event occurs to make them work on the same case at the same time. The pre-trial hearing in which the case is assigned gives them notice the case has to be attended to in the immediate future; and the hearing date of the Arbitration Panel puts a final date before which preparation, evaluation, client consent, and settlement discussion has to occur.

The arbitrators themselves are experienced men who possess and exercise a trained judgment in making their nonconclusive award. It is rather surprising to observe that in Arbitration Panels plaintiffs' lawyers seem to be less demanding than they are in evaluating their own individual cases, and defendants' lawyers seem more generous in awarding damages and in finding liability than they tend to be in the defense of their individual clients. The independent judgment of the Panel has considerable persuasive effect.

There is another factor. Many claimants want desperately to be heard. They want someone in the community to know what they have suffered, and they want the defendant to answer in public for his wrong. The arbitration hearing is formal enough to satisfy the need for public knowledge and public concern.

An important feature of the system is that there are three arbitrators, and not a single auditor. Group decisions tend to be less erratic, and more moderate, than individual decisions.

The arbitration system co-exists within the jury trial system, and the arbitrators are continually attuned to prevailing jury attitudes on both liability and damage factors. Arbitration awards parallel the current jury averages, without the extremes. There may be additional benefit to the plan in the fact that the roles of arbitrator and advocate for a party are reversed from time to time. The arbitrator lives and works within the adversary trial system, and his judgment must be influenced by his repetitive experience. Whatever the reason, the hearings are held with mutual dignity and respect, and a minimum of showmanship.

The plan commands the support it receives because it does not threaten any of the lawyer participants with the elimination of their profession, and does not threaten the party with deprivation of constitutional rights. It could not function so smoothly and well if the Awards were final and conclusive—or if they were to be laid in evidence before a subsequent jury.

How would this system work with the Federal District Court framework? It is, by nature, intended to apply chiefly to tort cases where the damages are not large. There is no reason to believe that the size of the Award is a necessary

limiting factor. Most trial lawyers can evaluate an injury worth $100,000 as readily as an injury worth $1,500. The arbitration plan could work in Jones Act, FELA, and Diversity tort cases without respect to dollar amount, if the arbitrators were chosen from the trial lawyers in the federal bar who have experience in those matters. It could work equally well in Federal Tort Claims Act cases, as a preliminary to Judge trial rather than jury trial.

The 1976 Annual Report of the Director of the Administrative Office of the United States Courts gives statistics, in table I–30, of the dispositions in the Calendar year 1976 of all categories of cases. There are separate columns showing the manner of disposition, classified as No Court Action; Before Pre-trial; During or After Pre-trial, and Trial. In cases classified as Federal Question cases and as Tort Action cases, the subheads are FELA, Marine Personal Injury, Other Personal Injury, and Other Torts. In this total group 7,264 cases were disposed of, with 645 dispositions by trial—about 9 percent.

The cases classified as Diversity-Tort include Marine, Motor Vehicle, Other Personal Injury, and other Tort. In the total of 14,030 dispositions, some 2,081, or 14.8 percent, were terminated by Trial.

There were 2,113 cases in the group classified as United States cases-Tort Action, subclassified as Marine; Motor Vehicle, and Other Personal Injury and as Other Torts. A total of 314 cases, or 14.8 percent, reached disposition in Trial.

The combined totals for this entire group, as described, would be: 23,407 cases disposed of; 9,595 with No Court Action; 3,717 Before Pre-trial; 7,055 During or After Pre-trial; and 3,040 by Trial. In percentages, 41 percent of the dispositions were with No Court Action; 16% were Before Pre-trial; 30 percent were During or After Pre-trial and 13 percent required Trial.

It is not clear, from the Report's captions, whether "Trial" includes both verdicts and settlements or other disposition during trial. The 13 percent Trial figure should be compared with either the 3 percent of arbitration cases which are called for trial, or with the 1.5 percent which are tried to final verdict. It is clear that if the arbitration plan worked as well in the District Court cases in the Ninth Circuit, a substantial saving in judicial time and resources could be made.

It must be observed, however, that the class of cases described are most certainly not the cause of the docket congestion that has inspired many recent demands that all Civil Tort litigation must be cast out of the Federal system. The same 1976 Annual Report shows the filings of all civil cases during the fiscal year 1976, and during each earlier year to 1966. In 1966, 70,906 total civil cases were filed. In 1976, 130,597 were filed—an increase factor of 1.84. The following table shows the filings and increase or decrease in selected categories of cases:

Type of case	Year 1966	Year 1976	Percentage of 1976 to 1966
U.S. defendant:			
Tort claims	1,849	2,002	108
Marine injury	235	136	68
Federal question:			
Jones Act	4,321	3,732	86
FELA	1,050	1,329	126
Diversity:			
Motor vehicle Personal injury	7,943	5,351	67
Other personal injuries	5,453	6,611	121
Total	20,851	19,161	91.9
Compare:			
U.S. Defendant:			
Social security	1,091	10,354	949
Prisoner petitions	2,292	4,780	209
Federal Question:			
Labor cases	1,612	5,519	342
Antitrust	722	1,504	208
State prisoners petitions	5,952	15,013	252
Civil rights	1,154	10,585	917
Other	2,346	11,586	494
Diversity cases: contract	5,724	11,586	494
Total	20,893	74,609	357

It would appear that the types of cases best suited to the arbitration plan described above have not increased in annual filing rate from 1966 to 1976, but have instead shown a moderate decrease. Other types of civil litigation are increasing in heavy quantities. There may be some debate whether alternative methods for dispute resolution should be imposed only on those citizens injured in body or mind in order to make room for the new litigants injured in pension rights, job rights, or civil rights. If this is necessary, the imposition of the mandatory but nonconclusive arbitration would seem to be a minimal burden on the basic rights of the victims of tortious injury.

STATEMENT OF CRAIG SPANGENBERG, ESQUIRE, CHAIRMAN, CONGRESSIONAL LIAISON, ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. SPANGENBERG. I hope you appreciate my difficulty. I have been on at least two different commissions for some years that have dealt with arbitration. I have much to do with the Cuyahoga County approach to arbitration. I have written and spoken independently about this. But, I am speaking to you now on a matter on which the board of directors of the Association of Trial Lawyers of America has not taken, with respect to this bill, an official position. So, I would like to distinguish between my personal opinions as an independent scholar, if I may, and official board opinions.

I have noted that in two other areas of tort law, the association formally has adopted the concept of arbitration for cases up to $25,000. I would see no problem with that limit.

With respect to the bill itself, however, I think clearly the Office For Improvements In The Administration Of Justice is relying upon the success of certain experimental plans, the Philadelphia plan, and the Ohio plan. Those plans have, indeed, been successful.

In approaching questions about the bill, I would like to address myself briefly to the reasons why, on principle, those plans have been so successful to see whether they will translate into the Federal plan.

Taking the Cuyahoga County plan: Cases are referred with a cutoff date of 48 hours before the hearing after which arbitration fees must be paid. For every 100 cases referred to arbitration, 25 of the 100 will be settled by the parties before the cutoff date, and another 15 will be settled within that cutoff period, leaving a total of 40 cases settled before the arbitration hearing.

In roughly 60 cases of the 100 that go to full arbitration hearing, the findings are about 40 for the plaintiff and 20 for the defendant which is in accord with the general jury run in Cuyahoga County.

Of those 60 cases in which there is an award, either pro plaintiff, or pro defendant, in 45 the award will be accepted and 15 will be appealed.

But the appeal appears to be, to some extent, a move to delay the case further, or to state a bargaining position to create obstacles, in order to try and get a settlement below the award. Almost all of the appeals are filed by the defendant, who is insured. Of those 15 cases appealed, 12 are actually settled before trial and another one and a half during trial but before a verdict. So, the overall result is that only 1½ percent of the thousands of cases that are referred to arbi-

tration have gone on to trial and jury verdicts. This is a very, very high percentage of success.

Why is that so? I think it is so because of some particular features of the plan.

First, we are dealing with cases in which the trial lawyers in the community generally have considerable knowledge, and they are the arbitrators.

The plan requires three. The chairman is selected from a list set up by a screening committee of the court who know who the top trial lawyers are. The chairman is always a seasoned trial lawyer with a great deal of experience. The other two are taken from two other lists, one being chiefly lawyers who chiefly are found on the plaintiff's side and the other list chiefly lawyers who are found on the defendant's side. So there is, to the extent possible, a balance in bias.

The Federal plan does not require that nor does it discourage it, in that under the Federal plan the court itself can set up its own criteria for who the arbitrators will be, and how they will use the list.

Unless there is some feeling in the bar that the arbitration panel is balanced, however, you can expect resistance. A very important feature of the Ohio plan is that the arbitration and the trial by the trial lawyers are all conducted by a group who are in constant contact in the trial field. There is constant peer review, if you will, which does eliminate a lot of the posturing that might occur in a full jury trial. These men know each other. They know that everyone in the room is experienced. The arbitrations proceed, really, with an overwhelming majority of all facts stipulated, and all bills stipulated, and all medical reports stipulated. The medical reports are evaluated because some doctors have a well-deserved reputation of being overly pesimistic and others overly optimistic. But the arbitrators all know who those doctors are and know how to evaluate their reports.

So, you are dealing with a very knowledgeable and expert panel.

I think that is essential to the plan, if you are going to have short arbitrations which is the whole reason we have a very modest fee.

I might tell you that the fee has some historical background. In order to try the plan, since the court was without funds, we got some grants from a foundation. We were trying to spread the grant as far as we could, so we set fees accordingly, and called for recapture of fee on appeal. The recapture was simply because it was an appeal, and it was not collectible as costs. In that sense, we follow the Philadelphia system, where paying the arbitration fee does not lead to a possibility of getting the fee you have paid back if you win the case eventually. I think that, too, is a good idea.

Beyond that I do have a very serious criticism of the bill as it is drawn. I was a litle troubled to hear the constitutional aspect of the bill lightly dismissed by earlier speakers. I recognize that jury trial, although it is an absolute right, is a right which may be constricted, to a limited extent, by minor regulatory details. The Ohio plan has not been subjected to the constitutional test and it is not likely that it will be because it enjoys the universal support of the

bar and the court. We like the plan. We are not about to have it declared unconstitutional.

That will not be so in the Federal system which is a much larger plan and encompasses a greater variety of cases and much more difficult cases because of the size of your cutoff.

I do want to point out to you, and have in my formal address, that we are not dealing here with penalties that are minor. Let's assume that the plaintiff seriously believes that his case is worth at least $30,000. He arbitrates it because he doesn't get that offer. The arbitrators award him $20,000 for any one of a number of reasons. He is still dissatisfied and wants his jury trial and goes back on the docket. In some courts he will wait 2 years and in other courts even more than that for trial.

Let us assume that he gets a very conservative jury and gets an award of $20,000. The penalty then is extraordinary. He must pay interest on the award he did not get and could not use and pay it into court, almost as a fine. We are not dealing with small numbers.

Two year's interest at 6 percent on $20,000 is $2,400; plus the costs. When you get to that level of penalty, I think you have raised a serious constitutional problem. I think, really, you have destroyed the whole concept of our voluntary arbitration, which is not to make it a substitute for jury trial, but an adjunct to it. We want to get rid of the smaller cases. We know the court is burdened with them. Arbitration is a very effective way to do it. It takes time and the arbitrators are not serving for the fee which is totally inadequate. In fact, many of them have said that they feel the fee is insulting and they would rather serve for nothing. I think we would have as many arbitrators if there were no fee at all.

They are serving in friendly relationship with the court and with a very sincere desire to help the court with its burdens. At the same time there is a selfish desire to free the trial rooms for their own larger cases. So they want to see the docket moving.

But it is friendly, and it is voluntary. Once you turn it around to say that you are going to set up a penalty system, not only to make them arbitrate, but to make them accept the award, then I think you will lose that spirit of cooperation.

I might say that this is a purely personal observation, Senator. There are some members of the bar and I number myself among them, who are very uncomfortable these days wondering just how much friendship there is from the bench toward the bar. We see a great deal of public criticism. I wake up many mornings wondering which half of the bar I am in.

We see a great drive to get rid of trials, and what we consider to be time honored, and time tested, and fundamental rights, and the things for which courts were created. We now feel the Federal system wants to get rid of us so that they can go decide constitutional cases, civil rights cases, prisoner petition cases, and a host of cases of a different type than the traditional mix.

On that subject, in my ninth circuit speech, I did go through the reports of the administrative office and found what was surprising to me. I thought there had been an increase in tort cases, I had read so

much about it in the no-fault propaganda. I found that traditional damage litigation, over the last decade, has declined 8 percent. Whatever burdens there are on the courts are not coming from the kind of cases that are to be arbitrated. They are coming from a great many other kinds of litigation which will not be arbitrated. So, the beneficial effect on the system of the bill will be limited.

A final observation that I do not want to emphasize on the record is this. Philosophically, if you say that you will put a penalty on a man if the jury award is not more favorable than the arbitration award, you are, in principle, saying that the jury award is correct, and you will punish him for not having anticipated that the arbitrators were also right in that they gave the same award that the jury did.

There is only one empirical study in the United States, of which I have knowledge, in which a serious attempt was made to find out what the range of verdict of juries were. This was the University of Chicago's project. They tested real live jurors. They took them out of the bullpens of county courthouses. The jurors, however, were not screened. No one took preemptory challenges, so you did not get rid of the extremes in that panel by the selection process as you would in a real trial.

But, passing that point, when an actual case was tried to those jurors, it was tried on tape and tried to hundreds of different jurors. I can tell you a little more about it than is in the speech. The actual case had been tried up to the point of final argument, at which point it was settled by the lawyers for $42,500. It was a substantial case. It was a case within your range. The average of all jury verdicts was $41,000, which led Professor Calvin, in one of his writings, to say that he thought experienced trial lawyers had a very good feel for what an average verdict would be. He said they tended to discuss settlement on the range of the average value.

He pointed out, however, that if the defendant had offered $42,500, and then there had been a low verdict, then he would have been criticized for having offered too much. Or, if the plaintiff had offered to settle for $42,500, and if it had been rejected, and he had gotten a high verdict, then he would have been criticized as not knowing how good his case was.

Mr. Calvin said that probably many settlements that get criticized on that basis, are criticized unjustly in that the high verdict was $60,000 in the series and the low verdict was $17,500, which is a range of more than 3 to 1.

Within the confines of that study, that is, with unselected jurors in the same trial, the study produced that very broad range of verdict, 3 to 1, with $60.000 to $70,000 high, and $17,500 low, against the median of $41,000. This is not to be taken as an indictment of the jury system. The normally suggested alternative is why not do away with the jury and try the case with a single judge.

So, the same tape was played to a large group of judges. Here the single judge, high verdict, was $65,000 which was higher than any jury verdict. The lower was $8,000, which was lower than any jury verdict. The range of 8 to 1 is there. Judges as a class were far more erratic than jurors.

This does not mean that juries are smarter than judges. This just means that any group decision will be nearer to a median or average level than any single man decision.

That is one of the major reasons, I think, that the single man arbitration of community standards, such as what is ordinary care and what is reasonable compensation, is likely to be erratic, but in any event, if the person who receives the award does not choose to accept it, I do not think that he should be penalized at all.

Certainly, I do not think he should be penalized by a direct comparison of one arbitration award to one jury trial award. There really is no standard to determine what the exact value should be and the jury trial will be unnecessarily and unconstitutionally restricted if that comparative standard remains in the bill.

That is all I have to say.

Senator DeConcini. Let me ask you a couple of questions and Mr. Altier has some too.

Regarding the selection of arbitrators based on your experience and on your testimony—I have not had a chance to read it although Mr. Altier has.

Do you feel that it is better for the individual litigants to choose the arbitrators from the panel? Or, do you think we should have the judge appoint them? Do you see any difference? Should there be a combination?

Mr. Spangenberg. I see a problem with it. In our plan we asked lawyers to volunteer. There is a screening committee of the court which goes over them. Not all volunteers are accepted as arbitrators. The court wants to know that they have really expert knowledge in this field. We are arbitrating with trial lawyer arbitrators, not general arbitrator lawyers, you understand.

We are in a metropolitan area where there is a large enough group, a large pool, from which we can draw. The notion of appointing the arbitrators by random choice is to have a uniformity of service because everyone recognizes that it is a volunteer, and to a considerable extent, a sacrificial service. I certainly would not volunteer for a panel, if any litigant could choose me and then I had to go serve. If I become popular, then it ends my practice.

Senator DeConcini. What if there was a relative assurance that you did not have to serve if you did not want to? My real point is whether it is important to let the litigants have the choice or to just have the judge appoint from a pool.

Mr. Spangenberg. In voluntary arbitration I think the litigants should choose. Even in voluntary binding, you are presupposing that. If there are three, then each one chooses an advocate who is his trial lawyer. They try to agree on an impartial third. That is the way the system works in practice in many cases.

We are not looking for a system where the arbitrator is either side's arbitrator who is going to pick an impartial third. We would want all three to be disinterested completely in that case.

If we get to choosing arbitrators, I think there is some psychological burden that goes on the man chosen to be responsive to the implied compliment that he was chosen.

I would rather—as an arbitrator, I would rather be picked by random choice to sit on the case than to feel that I had been selected

by one side. It would make me wonder a little about how I should discharge my duties and what it might do to me in responding to that side's plea.

Senator DeConcini. Mr. Altier?

Mr. Altier. In an extraordinarily complex case in which monetary damages are not in excess of $50,000, would you favor a payment of some sort of higher fee?

Mr. Spangenberg. Yes, of course. We are dealing in Ohio with 1 and 2 hour arbitrations, with everything stipulated. When you throw in contract cases, that is, construction contract cases—and I took one of those once and decided never again because there were 40 file cabinets of documents that I had to go through as a trial lawyer—so I do not know how an arbitrator is going to handle that in 2 hours. Once you get into multiple pounds of paper to be reviewed these contract cases tend to be not one case for $50,000 but 40 cases for $1,200 per item. You have to go through each one.

That is not a sacrifice that the bar wants to make, that is, to sit through a week's arbitration without a fee.

Mr. Altier. I don't recall whether you addressed this subject or not, in your prepared statement, but regarding the 120-day discovery period, under the bill, do you have any comments concerning whether the 120-day period should be set or should discovery be disposed of before you go to arbitration?

Mr. Spangenberg. It struck me as far too short. That would strike most trial lawyers of my association as short. The reason is this. Discovery is essential to the trial. Major cases involve a heavy burden of discovery. You tend to allocate your time to those matters of greatest importance. So, our available time for discovery, when we are not in actual trial or settlement negotiations, does get put upon the various serious complex difficult cases. We fill in between times on the smaller cases.

If I may comment on the general statement about the trial judge in Florida who gets his discovery done in the 120 days. I won't name him either. I know who he is. We have a judge in our district who sets up those tight schedules and drives you. We could not survive if it were not for the fact that he is the only judge who does. He gets priority because he demands it. If all the judges demanded that, we couldn't live with it.

Your bill is saying that the most important case to discover is the smallest case. You have got to do it within 120 days or get a dismissal. I think it is a completely reversed set of priorities.

If you are getting rid of small cases, the smaller cases—I don't think $50,000 is small to be sure—but if you are getting rid of the smaller cases, then give more time for discovery in those. It does not hurt the court. If your own client is not driving you, then I can see no reason why we cannot continue to fit in discovery in the smaller cases in the gaps and spaces of time between major cases.

Within 120 days, I suppose I would have to hire more lawyers which is not economically practical, and that would be just to handle this type discovery schedule so that I wouldn't get sued for malpractice by getting it dismissed.

Mr. Altier. Thank you.

Senator DeConcini. Mr. Spangenberg, we thank you very much. We appreciate your testimony. I apologize again for the tardiness on the part of our committee.

Our next witness is Charles Tatelbaum, chairman, Eastern District of the Commercial Law League of America, from Baltimore, Md.

Senator DeConcini. You may proceed.

[The material follows:]

STATEMENT BY CHARLES M. TATELBAUM, CHAIRMAN, EASTERN DISTRICT COMMERCIAL LAW LEAGUE OF AMERICA

Re S. 2253—to encourage use of arbitration.

Mr. Chairman and Members of the Subcommittee, I am Charles Tatelbaum, Chairman of the Eastern District of the Commercial Law League and a member of the Board of Governors of the League. Mr. Robert Chatz, President of the League, asked me to express to you his regret that a meeting of the League in the West made it impossible for him to be here today and his appreciation for the opportunity for a representative of the League to testify at these hearings.

The Commercial Law League is an organization, founded in 1895, composed of approximately 6,000 members. Approximately 85% of the members are practicing attorneys devoting a major portion of their time to commercial law and regularly engaged in civil litigation in United States District Courts. The remainder of its membership consists of law professors, bankruptcy judges and representatives of commercial agencies and commercial law lists.

S. 2253 to encourage prompt, informal and inexpensive resolution of civil cases by use of arbitration in the United States District Courts, was reviewed carefully by the Laws and Legislation Committee of the League; and the recommendations of that Committee was approved by the Board of Governors of the League at its meeting on March 13th. We appreciate this opportunity to present those recommendations to this Subcommittee.

(1) *Concur in Recital of Findings.*—The League concurs in the recital of findings at the beginning of S.2253—that (a) in many Federal Judicial Districts, parties to civil litigation experience lengthy delays and avoidable expense in the adjudication of their litigation and (b) arbitration has proven to be an effective and fair means of adjudicating many kinds of civil disputes.

However, the League believes that mandatory arbitration, as provided in S.2253 ("mandatory" in that litigants would be given no choice if they are in a United States District Court which (a) has authorized the use of arbitration by local rule under proposed Section 641 or (b) has been designated on a test basis by the Chief Justice under Section 5) is not a fair method of alleviating the case backlog and may limit or eliminate the right of civil litigants to a jury trial.

(2) *Objection of the League to Mandatory Arbitration.*—If a United States District Court authorizes by local rule the use of arbitration in accordance with the proposed new Chapter 44 in Title 28 of the United States Code, Section 644 would provide that "the court shall refer to arbitration any civil action pending before it if"

(1) the United States is a party, and (A) the action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or (B) * * *; or

(2) the United States is not a party, and (A) * * *; or (B) (i) the relief sought (a) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or (b) * * *; and (ii) jurisdiction is based in whole or in part on (a) * * *; (b) Section 1331 or 1332 of this title and the action is based on a negotiable instrument or a contract; or (c) Section 1332 or 1333 of this title and the action is for personal injury or property damage.

We note that Section 648 would provide that within 20 days after the filing of the arbitration award with the Court, any party may demand a trial de novo in the District Court; but under Subsection (d), if the party who demanded a trial de novo fails to obtain a judgment in the District Court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the costs of the arbitration proceeding, including the amount of the arbitration fees and specified additional amounts.

The League believes that these mandatory arbitration provisions coupled with the penalties and costs on appeal unfairly limit and penalize litigants in Federal Courts. If the arbitration were voluntary, the League would have no opposition to the procedures and costs on appeal because both parties would have voluntarily consented to the use of the arbitration procedure.

However, when the arbitration is mandatory the litigants may become subject to the costs and penalties on appeal without consent. Furthermore, mandatory arbitration would limit, if not eliminate, the right to a jury trial for civil litigants. The mere fact that a jury trial may be elected on appeal from arbitration does not adequately protect the litigant's constitutional right to a jury trial because the costs and penalties on appeal could be so prohibitive as to discourage a litigant from exercising the constitutional right to a jury trial.

(3) *Selection and Payment of Arbitrators.*—Section 642(b)(1) would provide that an individual may be certified to serve as an arbitrator only if he has been for at least 5 years a member of the Bar of the highest Court of the State and is admitted to practice before the certifying Court. We suggest that this may preclude utilization of experienced arbitrators who happen not to be attorneys.

Section 643 would provide that arbitrators shall receive as full compensation for their services a fee not to exceed $50.00 for each case in which they serve. We believe that the $50.00 maximum would discourage the participation of qualified individuals who might otherwise be willing to take the time to assist the Courts with the arbitration process.

Section 645(b) would provide that, unless the parties agree on a person or persons to conduct the arbitration, the arbitrator shall be chosen by the clerk "by a process of random selection from among the persons certified by the court." This appears to preclude the possible advantages of the utilization of one or more arbitrators who have specialized expertise in the subject of controversy.

(4) *Copies of Transcript.*—Section 646(d) would provide that, if a party has a transcript or a tape-recording made of the arbitration hearing, he shall furnish a copy of the transcript or tape-recording without charge to any other party. We believe that this is unfair, would discourage the recordation of testimony and would only encourage last minute utilization of the reporting service so as not to be the first one to order the transcript or tape-recording and incur the obligation to furnish copies without charge to other parties.

(5) *Previous Arbitration.*—S.2253 does not provide any by-pass of the mandatory arbitration where the civil action in a United States District Court is based upon a previous arbitration, such as a mandatory arbitration pursuant to a contract provision.

(6) *Legislation Should be Deferred Pending Experience in Trial Use of Mandatory Arbitration.*—Since mandatory use of arbitration is being required on a test basis in Hartford, Philadelphia and San Francisco, we respectfully suggest that it would be prudent to defer adoption of legislation until there has been an opportunity to appraise the results in these test areas. The experience there should demonstrate whether the parties are satisfied with the procedures and whether there are a large number of appeals from the arbitration awards. Also, most importantly, it may precipitate a determination on the question of denial of the right to a jury trial.

Finally, a technical point. Where Section 645(a)(1) provides that the clerk shall refer the action to arbitration "If, by the expiration of that time, no party has filed a motion for judgment on the pleadings, summary judgment, or similar relief", we believe that there should be inserted following "similar relief" in line 17 of page 7 the words "or has initiated discovery proceedings."

The Commercial Law League appreciates the opportunity to present these views and suggestions at this hearing and would be pleased to provide any additional information that might be helpful.

STATEMENT OF CHARLES M. TATELBAUM, ESQUIRE, CHAIRMAN, EASTERN DISTRICT, COMMERCIAL LAW LEAGUE OF AMERICA

Mr. TATELBAUM. Mr. Chairman, I am Charles Tatelbaum, chairman of the Eastern District of the Commercial Law League of America and a member of the board of governors of the League. Mr. Robert Chatz, who is president of the League, has asked me to ex-

press to you his regret that a meeting of the League on the west coast has made it impossible for him to be here today. He, as well as I, and the rest of the League express our appreciation for the opportunity for a representative of our organization to appear at these hearings.

The Commercial Law League is an organization, founded in 1895, composed of approximately 6,000 members. Approximately 85 percent of the members are practicing attorneys devoting a major portion of their time to commercial law and regularly engaged in civil litigation in U.S. district courts. The remainder of its membership consists of law professors, bankruptcy judges, and representatives of commercial agencies and commercial law lists.

S. 2253 to encourage prompt, informal, and inexpensive resolution of civil cases by the use of arbitration in the U.S. district courts, was reviewed carefully by the laws and legislation committee of the League; and the recommendation of that committee were approved by the board of governors of the League at its meeting on March 13. We appreciate this opportunity to present those recommendations to this subcommittee.

First, the League concurs in the recital of findings at the beginning of S. 2253—that: (a) in many Federal judicial districts, parties to civil litigation experience lengthy delays and avoidable expense in the adjudication of their litigation and (b) arbitration has proven to be an effective and fair means of adjudicating many kinds of civil disputes.

However, the League believes that mandatory arbitration, as provided in S. 2253, "mandatory" meaning that litigants would be given no choice if they are in a U.S. district court which: (a) has authorized the use of arbitration by local rule under proposed section 641 or (b) has been designated on a test basis by the Chief Justice under Section (5) is not a fair method of alleviating the case backlog and may limit or eliminate the right of civil litigants to a jury trial.

Parenthetically, I, too, concur in the statements previously made that the question of the constitutionality of the jury trial provision has not been fully explored. I certainly am not the constitutional scholar who is competent to express an opinion on that; but we have fears on the constitutionality and ask that serious consideration be given of it.

Second, regarding the objection of the league to mandatory arbitration, if a U.S. district court authorizes by local rule the use of arbitration in accordance with the proposed new chapter 44 in title 28 of the United States Code, section 644 would provide that "the court shall refer to arbitration any civil action pending before it if:

(1) the United States is a party, and (A) the action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or (B) ***; or

(2) the United States is not a party, and (A) ***; or (B) (1) the relief sought (a) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or (b) ***; and (ii) jurisdiction is based in whole or in part on (a) ***; (b) section 1331 or 1332 of this title and the action is based on a negotiable instrument or a contract; or (c) section 1332 or 1333 of this title and the action is for personal injury or property damage."

We note that section 648 would provide that within 20 days after the filing of the arbitration award with the court; any party may demand a trial de novo in the district court; but under subsection (d), if the party who demanded a trial de novo fails to obtain a judgment in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the costs of the arbitration fees and specified additional amounts.

The League believes that these mandatory arbitration provisions coupled with the penalties and costs on appeal unfairly limit and penalize litigants in Federal courts. If the arbitration were voluntary, the League would have no opposition to the procedures and costs on appeal because both parties would have voluntarily consented to the use of the arbitration procedure.

However, when the arbitration is mandatory, the litigants may become subject to the costs and penalties on appeal without consent. Furthermore, mandatory arbitration would limit, if not eliminate, the right to a jury trial for civil litigants in certain cases. The mere fact that a jury trial may be elected on appeal from arbitration does not adequately protect the litigant's constitutional right to a jury trial because the costs and penalties on appeal could be so prohibitive as to discourage a litigant from exercising the constitutional right to a jury trial.

Third, in regard to selection and payment of arbitrators, section 642(b)(1) would provide that an individual may be certified to serve as an arbitrator only if he has been for at least 5 years a member of the bar of the highest court of the state and is admitted to practice before the certifying court. We suggest that this may preclude utilization of experienced arbitrators who happen not to be attorneys.

Section 643 would provide that arbitrators shall receive as full compensation for their services a fee not to exceed $50 for each case in which they serve. We too believe that the $50 as a maximum would discourage the participation of qualified individuals who might otherwise be willing to take the time to assist the courts with the arbitration process.

If I may take the time, I would like to deviate from my prepared statement and state that I am presently involved in a case in Arizona that would be of the nature that would be definitely amenable to arbitration process. The case was in Santa Cruz County, Ariz., and removed to Tucson on the Federal court because it was a very complicated products liability case. The use of a layman or a person specifically experienced in product liability would be more beneficial, certainly to the jury in Santa Cruz County, which is on the Mexican border, or even the jury in the Federal court in Tucson, where a specialized arbitrator with products liability experience in the field could be utilized.

Senator DeConcini. You are suggesting that we should not restrict it to lawyers?

Mr. Tatelbaum. Yes, sir.

Senator DeConcini. If you do that, then what would you suggest as a standard in order to find qualified people with certain areas of expertise to sit in products liability cases?

Mr. Tatelbaum. We would suggest that it be left to the decision of the chief judge of the district.

Senator DeConcini. Let him set whatever standard of criteria is necessary to be a lay arbitrator?

Mr. Tatelbaum. In most of the districts the chief judge is located in one of the major cities of the district. It is probably from where most of the experts would be pooled, if necessary. Based upon most chief judge's experience that I have found, and I clerked for one immediately after law school, he is aware of who the experts are in various fields because they have testified before him in the past or he is a member of the community. I think that the chief judge being at the point would be in a position to either, from his own knowledge, or from other recommendations, select the specialized arbitrators necessary.

Senator DeConcini. Thank you.

Mr. Tatelbaum. Section 645(b) would provide that, unless the parties agree on a person or persons to conduct the arbitration, the arbitrator shall be chosen by the clerk "by a process of random selection from among the persons certified by the court". This appears to preclude the possible advantages of the utilization by the court of one or more arbitrators who have specialized expertise in the subject of controversy.

Fourth, regarding copies of the transcript, section 646(d) would provide that, if a party has a transcript or a tape-recording made of the arbitration hearing, he shall furnish a copy of the transcript or tape-recording without charge to any other party. We believe that this would be unfair, would discourage the recordation of testimony and would only encourage last minute utilization of the reporting service so as not to be the first one to order the transcript or tape recording and incur the obligation to furnish copies without charge to other parties.

Fifth, regarding previous arbitration, S. 2253 does not provide any bypass of the mandatory arbitration where the civil action in a U.S. District Court is based upon a previous arbitration, such as a mandatory arbitration pursuant to a contract provision. This would be like a construction contract or those involving the Miller Act.

Sixth, since mandatory use of arbitration is being required on a test basis in Hartford, Philadelphia, and San Francisco, we respectfully suggest that it would be prudent to defer adoption of legislation until there has been an opportunity to appraise the results in these test areas.

I might add my personal feelings based upon previous statements made today, that I don't believe 60 or 90 days would be a fair determination because you must analyze the appeals and the appellate process to determine how the appellate process concurs or differs from the arbitration process. Again, it is my own opinion based upon what I heard this morning that I think a 60- or 90-day period would not be fair. Also, I think it would give the committee, or the Senate, or the courts, the opportunity to determine whether or not the right to a jury trial has been constitutionally impaired.

The experience there should demonstrate whether the parties are satisfied with the procedures and whether there are a large number of appeals from the arbitration awards. Also, most importantly, it

may precipitate a determination on the question of denial of the right to a jury trial.

Finally, a technical point. Where section 645(a)(1) provides that the clerk shall refer the action to arbitration "If, by the expiration of that time, no party has filed a motion for judgment on the pleadings, summary judgment, or similar relief", we believe that there should be inserted following "similar relief" in line 17 of page 7 the words, "or has initiated discovery proceedings."

The Commercial Law League appreciates the opportunity to present these views and suggestions at this hearing and I would be pleased to answer any questions.

Senator DeConcini. We thank you very much, Mr. Tatelbaum. Your testimony is very helpful and has brought some things to our attention. It will help the committee to refine a few of our ideas. That is exactly the purpose of these hearings. I am very appreciative.

I have no questions nor does Mr. Altier, so we will tell you that we apologize for the inconvenience that we caused you by the unexpected delay.

Senator DeConcini. We thank you very much.

The committee stands adjourned.

[Whereupon at 12:10 p.m., the subcommittee was adjourned.]

APPENDIXES

U.S. DISTRICT COURT: DISTRICT OF CONNECTICUT

The following Rule 28 attached hereto concerning arbitration is hereby adopted as an addition to the local civil rules of the District Court for the District of Connecticut effective April 1, 1978.

T. EMMET CLARIE,
Chief Judge.
JON O. NEWMAN,
U.S. District Judge.
T. F. GILROY DALY,
U.S. District Judge.

Dated March 29, 1978.

RULE 28—ARBITRATION

Sec. 1. Scope and effectiveness of rule

This Rule governs the mandatory referral of certain actions to non-binding arbitration. It shall become effective on April 1, 1978, and shall apply to actions thereafter filed which fall within the scope of this Rule. Its purpose is to provide an incentive for the speedy, fair, and economical resolution of controversies involving moderate amounts by informal procedures while preserving the right of a conventional trial.

Sec. 2. Certification of arbitrators

(a) *Certification.*—The Chief Judge shall certify as many arbitrators as he determines to be necessary under this Rule.

(b) *Eligibility.*—An individual may be certified to serve as an arbitrator if:

(1) the person has been for at least five years a member of the Bar of the highest court of any State or the District of Columbia; and

(2) the person is either a member of the Bar of the United States District Court for the District of Connecticut or a member of the faculty of an accredited law school within Connecticut; and

(3) the person is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

(c) *Oath or Affirmation.*—Each arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator.

(d) *Maintenance of List.*—A list of all persons certified as arbitrators shall be maintained in the office of the clerk.

(e) *Supplementing List.*—The list may be supplemented from applications submitted to the Chief Judge by or on behalf of attorneys willing to serve and eligible under Sec. 2(b).

(f) *Selection by Agreement.*—The parties may by mutual agreement designate arbitrators who are neither lawyers nor certified under this Rule.

Sec. 3. Compensation and expenses of arbitrators

Except as provided under Sec. 7(1), arbitrators selected under this Rule shall serve without compensation.

Sec. 4. Categories of cases to be referred

The Court shall refer to arbitration any civil action filed on or after April 1, 1978, if

(a) the United States is a party, and:

(1) the relief sought consists only of money damages not in excess of $100,000, exclusive of interest and costs: and

(2) the action is brought pursuant to the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671 *et seq.*);

(b) the United States is not a party, the plaintiff is not incarcerated, and:

(1) the relief sought includes a claim for money damages not in excess of $100,000, exclusive of interest and costs; and

(2) the action is for breach of contract or for personal injury or property damage, and jurisdiction is based on diversity of citizenship (28 U.S.C. § 1332); or

(3) the action is for police misconduct, and jurisdiction is based on 28 U.S.C. § 1343; or

(c) the parties consent to arbitration.

Sec. 5. Referral to arbitration

(a) *Prompt Notification.*—If an action is to be referred to arbitration under this Rule, the clerk shall so notify the parties following defendant's appearance.

(b) *Pre-Arbitration Timetable.*—With respect to actions subject to arbitration pursuant to this Rule, the following pre-arbitration timetable shall apply:

(1) a motion for judgment on the pleadings, summary judgment, or similar relief may be filed within twenty days of the filing of the answer;

(2) within thirty days after the defendant's appearance, the magistrate shall hold a status conference to supervise discovery, narrow issues, determine the number of arbitrators when disputed (see Sec. 5(c)), and determine any application pursuant to Sec. 6(a) and any claim that the case is not subject to arbitration under Sec. 4;

(3) discovery may be conducted until ninety days after the filing of the answer, or the ruling of the Court on any motion filed under Sec. 5(b)(1), whichever is later;

(4) whether or not the aforesaid motion has been previously filed, such motion may be filed within ten days after expiration of the discovery period. A party does not waive the right to make any motion or conduct any discovery permitted by the Federal Rules of Civil Procedure (including further depositions of witnesses previously deposed or questioned at the arbitration hearing) by failing to move or discover within the above time periods, and any such motion or discovery may be initiated or renewed after arbitration if a trial *de novo* is timely sought.

(c) *Number of Arbitrators.*—The number of arbitrators shall be one, if all parties agree; or three, if all parties agree; or, in the event of disagreement, the choice of one or three shall be made by the magistrate at the status conference (see Sec. 5(b)(2)) with due regard for the likelihood that use of three arbitrators will significantly enhance the prospects for acceptance of the arbitrators' decision.

(d) *Appointment of Arbitrators.*—If the magistrate has not done so at the status conference, the clerk shall, during the ninety-day discovery period, submit to each party an identical list of names of persons chosen from the list of persons certified as arbitrators under this Rule. Each party shall have seven days from the status conference or the mailing date in which to cross off any names to which the party objects, number the remaining names indicating the order of preference, and return the list to the clerk. The parties may agree to an arbitrator or arbitrators who are not named on the list, provided the parties promptly notify the clerk within the aforementioned seven-day period. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the clerk shall invite the acceptance of the arbitrators to serve and ascertain available hearing dates. The Chief Judge may authorize the clerk to appoint a fourth arbitrator as an alternative to serve in the event one of the arbitrators becomes unavailable. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Court shall have the power to make the appointment from other persons certified as arbitrators under this Rule.

(e) *Disqualification.*—Any arbitrator shall be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and shall disqualify himself in any action in which the arbitrator would be required to do so under 28 U.S.C. § 455 if that person were a justice, judge, magistrate or referee in bankruptcy.

Sec. 6. Removal of cases referred to arbitration

(a) *Complex Cases.*—If at any time it appears that a case referred to arbitration is of such complexity that the arbitration hearing cannot be concluded within two days, any party may apply to the magistrate to have the case removed from the coverage of this Rule. The magistrate may remove the case from arbitration if he determines that the arbitration hearing is both unlikely to be concluded within two days and unlikely to provide an opportunity that will significantly enhance the prospects for settlement. If the magistrate removes the case from arbitration, the case will resume its status before the trial judge to whom it is assigned.

(b) *Statistical Comparisons.*—The Chief Judge may remove from arbitration any case or class of cases for the purpose of obtaining comparative statistical data regarding the effect of this Rule.

Sec. 7. Arbitration hearing

(a) *Time, Date, and Place.*—The arbitration hearing shall commence within sixty days after expiration of the discovery period specified in Sec. 5(b)(3) or ruling on any motion filed under Sec. 5(b)(4), whichever is later. The clerk shall set the time and date of each hearing and shall mail to each party and to the arbitrators notice thereof at least fifteen days in advance. Hearings will normally be held at the appropriate United States Courthouse. Any request to postpone the hearing must be presented to the magistrate and may be granted only for extraordinarily good cause such as illness or unforeseen conflicting court dates.

(b) *Default for Failure to Attend.*—If a plaintiff fails, without good cause, to attend the arbitration hearing, the Court may, after notice and hearing, enter judgment dismissing the complaint. If a defendant fails without good cause, to attend the arbitration hearing, the Court may, after notice and hearing, order that judgment enter for the plaintiff pursuant to the requirements of Fed. R. Civ. P. 55(b). For any non-attendance, the Court may award the attending party reasonable expenses.

(c) *Stenographic Record.*—Any party desiring the attendance of a stenographer shall make the necessary arrangements. The cost of the stenographer's attendance fee, stenographic record, if any is made, and all transcripts thereof, shall be pro-rated equally among all parties ordering copies unless they shall otherwise agree and shall be paid for by the responsible parties directly to the reporting agency.

(d) *Interpreter.*—Any party desiring the services of an interpreter shall make the necessary arrangements and assume the costs of such services.

(e) *Attendance.*—Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrators to determine the propriety of the attendance of any other person.

(f) *Testimony Under Oath or Affirmation.*—All witnesses shall testify under oath or affirmation administered by any duly qualified person. Interpreters shall take the same oath used in the District Courts.

(g) *Conduct of Hearing.*—When three arbitrators conduct a hearing, they shall select one member of the panel to preside, but all evidentiary and procedural decisions shall be made by at least two of the arbitrators. A hearing shall be opened by the recording of the place, time and date of the hearing, the presence of the arbitrators and parties, and counsel, and by receipt by the arbitrators of the pleadings and any statement narrowing issues that may have been prepared by the magistrate (see Sec. 5(b)(2)). The arbitrators may, at the beginning of the hearing, ask for statements clarifying the issues involved. The plaintiff shall then present the claim and proofs and witnesses, who shall submit to questions or other examination. The defendant shall then present the defense and proofs and witnesses, who shall submit to questions or other examination. The arbitrators may in their discretion vary this procedure.

(h) *Exhibits.*—The parties may introduce photocopies of exhibits if the originals are available for inspection at the hearing. The presiding arbitrator

shall place all exhibits in the custody of the clerk at the conclusion of the hearing.

(i) *Subpoenas.*—Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule.

(j) *Evidence.*—The arbitrators shall be the judge of the relevancy and materiality of the evidence offered and conformity to the Federal Rules of Evidence shall not be necessary. The arbitrators may use the Federal Rules of Evidence as guides in determining the admissibility of evidence. All evidence shall be taken in the presence of all of the arbitrators and all of the parties or their counsel, except where any of the parties is absent in default or has waived his right to be present.

(k) *Conclusion of Hearing.*—To close the hearings, the arbitrators shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrators shall declare the hearings closed (see Sec. 7(1)). Counsel may make oral argument, but filing of briefs will ordinarily not be permitted. If the arbitrators decide to accept briefs, such briefs must be simultaneously filed within fourteen days.

(l) *Hearings Beyond Two Days.*—If an arbitration hearing is not concluded within two days, the hearing will terminate no arbitration award will be made, and the case will resume its status before the trial judge to whom it is assigned, provided however that the parties may by agreement proceed with the arbitration hearing beyond two days, in which event they will share the cost of a $250 per diem fee for each arbitrator for the third and any successive days of hearing. Such consent to an extended arbitration hearing, if given, is not a waiver of the right to trial *de novo.* An extended arbitration hearing may be terminated before all parties rest either by mutual agreement of the parties or by a decision of the arbitrators that continuation of the hearing is inappropriate; in either event no arbitration award will be made. A party proceeding *in forma pauperis* will be relieved of the obligation to share the per diem cost, in which event the cost will be proportionately reduced.

Sec. 8. Relief from time limits

Relief from any time limits specified in this Rule may not be accomplished by stipulation between the parties, but may be granted only by the magistrate and only for extraordinarily good cause.

Sec. 9. Arbitration award and judgment

(a) *Issuance of Award.*—The arbitrators shall issue their award within thirty days of the date of the closing of the hearing or receipt of briefs, whichever is later.

(b) *Award Procedure.*—The award shall be issued on forms approved by the Court and signed by at least a majority of the arbitrators. The award shall dispose of all of the monetary claims presented to the arbitrators. The arbitrators are not required or expected to issue any opinion explaining the award. The arbitration award shall be filed by the arbitrators with the clerk.

(c) *Judgment Upon Award.*—Copies of the award shall be mailed by the clerk to counsel. The award shall be entered as the judgment of the court after the time for requesting a trial *de novo* pursuant to sec. 10 of this rule has expired, unless a party demands a trial *de novo* before the court pursuant to sec. 10. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect, as a judgment of the Court in a civil action.

Sec. 10. Trial de novo

(a) *Twenty-day limit.*—Within twenty days after the filing of the arbitration award with the Court, any party may demand a trial *de novo* in the District Court.

(b) *Return to Court Calendar.*—Upon such a demand for a trial *de novo*, the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, and any right to trial by jury that a party would otherwise have shall be preserved inviolate.

(c) *Evidence From Arbitration Hearing.*—At the trial *de novo*, the Court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, unless the parties otherwise agree, except that

testimony given at an arbitration hearing, if transcribed and filed, may be used for the same purposes as any deposition under the Federal Rules of Civil Procedure.

(d) *Binding Arbitration by Agreement.*—The parties to any case subject to referral under this Rule may, by mutual agreement, waive the right to trial *de novo* before or after the arbitration hearing and agree to be bound by the arbitration award.

EASTERN DISTRICT OF PENNSYLVANIA: LOCAL DISTRICT COURT RULE—ARBITRATION

SEC. 1. CERTIFICATION OF ARBITRATORS

a. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

b. An individual may be certified to serve as arbitrator if: (1) he has been for at least five years a member of the Bar of the highest court of a State or the District of Columbia, (2) he is admitted to practice before this court, and (3) he is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

c. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28, U.S.C. §453 before serving as an arbitrator.

d. A list of all persons certified as arbitrators shall be maintained in the Office of the Clerk.

SEC. 2. COMPENSATION AND EXPENSES OF ARBITRATORS

The chairman of the arbitration panel shall be compensated at seventy dollars for each case in which he serves as chairman; the other two arbitrators on the panel shall each receive forty dollars for each case in which they serve. In the event the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated seventy dollars for each case in which it serves as a single arbitrator. The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

SEC. 3. JURISDICTION AND POWERS OF ARBITRATORS

The court shall refer to arbitration any civil action in which the complaint was filed after February 1, 1978 provided:

1. The United States is a party, and:

(A) the action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

(B) the action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. §270(b)), the United States has no monetary interest in the claim, and the relief sought:

(i) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

(ii) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; or

2. the United States is not a party, and:

(A) the parties consent to arbitration and the relief sought consists only of money damages; or

(B) (i) the relief sought:

(a) consists only of money damages not in excess of $50,000 exclusive of interest and costs; or

(b) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; and

(ii) jurisdiction is based in whole or in part on:

(a) Title 28, U.S.C. §1331 and the action is brought pursuant to Section 20 of the Act of March 4, 1915, as amended (Title 46, U.S.C. §688);

(b) Title 28, U.S.C. §§ 1331 or 1332 and the action is based on a negotiable instrument or a contract; or

(c) Title 28, U.S.C. §§ 1332 or 1333 and the action is for personal injury or property damage.

SEC. 4. REFERRAL TO ARBITRATION

(a)(1) Actions subject to arbitration pursuant to this rule shall automatically be referred to arbitration by the judge to whom the case has been assigned (acting through the courtroom deputy clerk) as soon as possible after a twenty-day period from the filing of the answer. In the event that a third party is brought into the action, this twenty-day period shall commence to run from the date of the filing of an answer by the third party. In the event that a party has commenced discovery within the twenty-day period, and the court is so notified, the case shall not be referred to arbitration until discovery has been completed or upon expiration of one-hundred twenty days from the filing of the answer, whichever occurs earlier. In the event that a party has filed a motion for judgement on the pleadings, summary judgement or similar relief, the case shall not be referred to arbitration until the court has ruled on the motion, but the filing of such a motion after referral shall not stay the arbitration unless the judge so orders.

(2) For the sole purpose of making the determination as to whether the damages are in excess of $50,000, exclusive of interest and costs, as provided in Sections 3(1)(B)(i), 3(1)(B)(ii), 3(2)(B)(i)(a) and 3(2)(B)(i)(b), damages shall be presumed in all cases to be less than $50,000, exclusive of interest and costs, unless counsel of record for the plaintiff at the time of filing the complaint or counsel of record for defendant at the time of filing an answer containing a counterclaim, files with the court a document signed by said counsel which certifies to the best of his knowledge and belief that the damages recoverable exceed the sum of $50,000, exclusive of interest and costs. The court may disregard such certification and require arbitration if satisfied that recoverable damages do not exceed $50,000.

(b) The arbitration shall be conducted before a panel of three arbitrators, one of whom shall be designated as chairman of the panel, unless the parties agree to have it conducted by a single arbitrator. The parties may be agreement select any person or persons to conduct the arbitration. If, within seven days after the action has been referred to arbitration, the parties have not notified the Clerk of the Court that they have made such a selection, the arbitrator or arbitrators shall be chosen by the Clerk by a process of random selection from among the persons certified as arbitrators by the court.

(c) A person selected to be an arbitrator shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. §144 and shall disqualify himself in any action in which he would be required under Title 28, U.S.C. §455 to disqualify himself if he were a justice, judge, magistrate or referee in bankruptcy.

SEC. 5. ARBITRATION HEARING

(a) The arbitration hearing shall commence not later than thirty days after the action is referred to arbitration and shall be concluded promptly.

(b) The chairman of the arbitration panel shall set the time, date and place of hearing, and shall give notice of the hearing date to the parties at least fifteen days prior to the date set for the arbitration hearing.

(c) The arbitration may proceed in the absence of any party who, after due notice, fails to be present, but an award of damages shall not be based solely upon the absence of a party.

(d) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter. Testimony at an arbitration hearing shall be under oath or affirmation.

(e) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence in an arbitration hearing, but strict adherence is not required. Relevance and efficiency shall be the primary considerations.

(f) A party may have a recording and transcript made of the arbitration hearing at his expense. If a party has a transcript or a tape recording made, he shall furnish a copy of the transcript or tape recording without charge to any other party, unless the parties otherwise agree.

SEC. 6. ARBITRATION AWARD AND JUDGMENT

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgement of the court after the time

for requesting a trial *de novo* pursuant to Section 7 has expired, unless a party demands a trial *de novo* before the court pursuant to that section. The judgement so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgement of the court in a civil action, except that it shall not be the subject of appeal.

SEC. 7. TRIAL DE NOVO

(a) Within twenty days after the filing of the arbitration award with the court, any party may demand a trial *de novo* in the district court.

(b) Upon a demand for a trial *de novo*, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial *de novo* the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial *de novo*.

(d) If the party who demanded a trial *de novo* fails to obtain a judgement in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the amount of the arbitration fees and, if he is a defendant, he shall pay to the plaintiff interest on the arbitration award from the time it was filed, at the current legal rate of interest.

TEMPORARY LOCAL RULE OF THE U.S. DISTRICT COURT FOR A NORTHERN DISTRICT OF CALIFORNIA

CHAPTER V—ARBITRATION

RULE 500—MANDATORY ARBITRATION

500–1. Scope and effectiveness of rule

This Rule governs the mandatory referral of certain actions to arbitration. It shall become effective on April 1, 1978, and shall apply to actions thereafter filed which fall within the scope of this Rule. This Rule shall terminate on March 31, 1979, on which date the procedures authorized hereunder shall cease in the absence of further order of the court. Its purpose while in effect is to provide an incentive for the speedy, fair and economical resolution of controversies involving moderate amounts by informal procedures while preserving the right to a conventional trial.

500–2. Actions subject to this rule

(a) *Categories of Actions.*—All civil actions failing within any of the following categories shall be subject to this Rule, except as otherwise provided:

(i) Actions in which the United States is not a party which—

(A) Seek relief limited to money damages not exceeding $100,000, exclusive of interest and costs, and in which any claim for non-monetary relief is determined by the assigned judge to be insubstantial; and

(B) Are founded on diversity of citizenship (28 U.S.C. § 1332), federal question (28 U.S.C. § 1331) or admiralty or maritime jurisdiction (28 U.S.C. § 1333) and arise under a contract or written instrument, or out of personal injury or property damage.

(ii) Actions in which the United States is a party which—

(A) Seek relief limited to money damages not exceeding $100,000, exclusive of interest and costs, and which arise under the Federal Tort Claims Act or the Longshoremen's and Harbor Workers Act (33 U.S.C. § 901 *et seq.*), or

(B) Arise under the Miller Act (40 U.S.C. § 270b), with the United States having no monetary interest in the claim, and seek relief limited to money damages not exceeding $100,000, exclusive of interest and costs, and in which any claim for non-monetary relief is determined by the assigned judge to be insubstantial.

(b) *Non-Monetary Relief Claim.*—Actions which are subject to this Rule except that they include a claim for non-monetary relief shall be referred to

the assigned judge immediately after the filing of a responsive pleading for determination whether for purposes of this Rule that claim is insubstantial. That determination may be made, in the judge's discretion, ex parte or following consultation with the parties.

(c) *Determination of Monetary Claim.*—At any time prior to the pretrial conference in any action otherwise subject to this Rule, the assigned judge may determine, on motion of any party or sua sponte, that for purposes of this Rule no genuine claim for damages in excess of $100,000 exists and that the action is subject to this Rule. The determination shall be made at any hearing or conference at which the parties are represented, without necessity, however, for a formal motion, memoranda or affidavits. In the event of such a determination, the action shall be referred to arbitration as herein provided.

500–3.Referral to arbitration

(a) *Time for Referral.*—Every action subject to this Rule shall be referred to arbitration by the clerk in accordance with the procedures under this Rule twenty days after the filing of the last responsive pleading, except as otherwise provided. If any party notices a motion to dismiss or for summary judgment or similar relief prior to the expiration of the twenty-day period, the motion shall be heard by the assigned judge and further proceedings under this Rule deferred pending decision on the motion. If the action is not dismissed or otherwise terminated as the result of the decision on the motion, it shall be referred to arbitration twenty days after the filing of the decision.

(b) *Authority of Assigned Judge.*—Notwithstanding any provision of this Rule, every action subject to this Rule shall be assigned to a judge upon filing in the normal course in accordance with the court's assignment plan, and the assigned judge shall have authority, in his discretion, to conduct status and settlement conferences, hear motions and in all other respects supervise the action in accordance with these Rules notwithstanding its referral to arbitration.

(c) *Relief From Referral.*—At any time prior to the expiration of the twenty-day period following the filing of the last responsive pleading, any party may notice a motion for relief from the operation of this Rule. Such motion shall conform to Rule 220 and shall be supported by a memorandum and, if appropriate, declarations showing good cause. The assigned judge may, in his discretion, exempt an action from application of this Rule where a party has demonstrated the existence of significant and complex questions of law or fact or other grounds for finding good cause.

500–4. Selection and compensation of arbitrators

(a) *Selection of Arbitrators.*—The office of the clerk shall maintain a roster of arbitrators who shall hear and determine actions under this Rule. Arbitrators shall be selected from time to time by the court from applications submitted by or on behalf of attorneys willing to serve. Any attorney who has been admitted to practice in California for not less than five years and is a member of the bar of this court shall be eligible for selection by the court. Each person shall upon selection take the oath or affirmation prescribed in 28 U.S.C. § 453.

(b) *Selection of Panel.*—Whenever an action is referred to arbitration pursuant to this Rule, the clerk shall forthwith furnish to each party a list of ten arbitrators whose names shall have been drawn at random from the roster of arbitrators maintained in the clerk's office. The parties shall then confer for the purpose of selecting a panel of three arbitrators in the following manner:

(i) Each side shall be entitled to strike two names from the list, plaintiff(s) to strike the first name, defendant(s) the next, then plaintiff(s) and then defendant(s);

(ii) The parties shall then select the panel from the remaining six names by alternating selecting one name, defendant(s) to make the first choice, plaintiff(s) the next, and continuing in this fashion;

(iii) At the conclusion of this process, the parties shall list the six names in the order selected and submit them to the clerk within ten days of receipt by them of the original list of ten names. In the event the parties fail to submit such a list within the time provided, the clerk shall make the selection of arbitrators at random from the original list of ten names;

(iv) The clerk shall promptly notify the three persons whose names appear as the first three choices of the parties of their selection, or, if no choices have been made, the persons he has selected. If any person so selected is unable or

unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to constitute a panel of three arbitrators from the six selections, the process of selection under this Rule shall begin anew. When three of the selected arbitrators have agreed to serve, the clerk shall promptly send written notice of the membership of the panel to each arbitrator and to the parties.

(c) *Disqualification.*—No person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist.

(d) *Withdrawal by Arbitrator.*—Any person whose name appears on the roster maintained in the clerk's office may ask at any time to have his name removed or, if selected to serve on a panel, decline to serve but remain on the roster. After a person has served as an arbitrator in an action, he shall not serve again for at least six months.

(e) *Compensation and Reimbursement.*—Arbitrators shall be paid seventy-five dollars for each day, or portion of a day, of hearing in which they participate. At the time when the arbitrators file their decision, each shall submit a voucher in form prescribed by the clerk for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing.

500–5. Hearings

(a) *Hearing Date.*—The arbitrators constituting the panel shall set a date for hearing not less than twenty nor more than forty days after notice from the clerk of the membership of the panel pursuant to Rule 500–4(b)(iv). Upon stipulation of the parties or written request of any party, the arbitrators shall continue the hearing date for not more than 100 days, during which time the parties may conduct discovery. Notice of the hearing date and of any continued hearing date shall be given by the arbitrators to the clerk who shall give written notice to the parties.

(b) *Default of Party.*—Subject to the provisions of subparagraph (a) above, the hearing shall proceed on the noticed date. Absence of a party shall not be a ground for continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrators.

(c) *Conduct of Hearing.*—The arbitrators are authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses except as herein provided. In receiving evidence, the arbitrators shall be guided by the Federal Rules of Evidence, but they shall not thereby be precluded from receiving evidence which they consider to be relevant and trustworthy and which is not privileged. A party desiring to offer a document otherwise subject to hearsay objections at the hearing may serve a copy on the adverse party not less than ten days in advance of the hearing indicating his intention to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, any hearsay objection to the document shall be deemed waived. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil Procedure.

(d) *Transcript or Recording.*—A party may cause a transcript or recording to be made of the proceedings at its expense but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. In the absence of agreement of the parties and except as provided in Rule 500–7(b) relating to impeachment, no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial of the action.

(e) *Place of Hearing.*—Hearings shall be held at any location within the Northern District of California designated by the arbitrators. Hearings may be held in any courtroom or other room in any federal courthouse or office building made available to the arbitrators by the clerk's office. When no such room is available, the hearing shall be held at any other suitable location selected by the arbitrators. In making the selection, the arbitrators shall consider the convenience of the panel, the parties and the witnesses.

(f) *Time of Hearing.*—Unless the parties agree otherwise, hearings shall be held during normal business hours.

(g) *Optional Waiver of Trial De Novo; Voluntary Arbitration.*—At any time prior to the commencement of the hearing, the parties may by written stipulation approved by order of the assigned judge waive the right to a trial de novo following the award and proceed as in voluntary arbitration. In the event of such a stipulation, the provisions of state and federal law governing review of awards rendered in voluntary arbitration shall govern.

(h) *Authority of Arbitrators.*—The arbitrators constituting the panel shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before them. Any two members of the panel shall constitute a quorum, but (unless the parties stipulate otherwise) the concurrence of a majority of the entire panel shall be required for any action or decision by the panel.

(i) *Ex Parte Communication.*—There shall be no ex parte communication between an arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

500–6. Award and judgment

(a) *Filing of Award.*—The arbitrators shall file their award with the clerk's office promptly following the close of the hearing and in any event not more than ten days following the close of the hearing. The clerk shall serve copies on the parties.

(b) *Form of Award.*—The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief if any awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by at least two members of the panel. No member shall participate in the award without having attended the hearing.

(c) *Entry of Judgment on Award.*—Promptly upon the filing of the award with the clerk, the clerk shall enter judgment thereon in accordance with Rule 58, Federal Rules of Civil Procedure. Unless either party files a demand for a trial de novo within thirty days of the entry of judgment, the judgment shall have the same force or effect as any judgment of the court in a civil action, except that no appeal shall lie from such a judgment (any notice of appeal shall be treated as a demand for a trial de novo).

500–7. Trial de novo

(a) *Time for Demand.*—If either party files and serves a written demand for a trial de novo within thirty days of entry of judgment on the award, that judgment shall immediately be vacated by the clerk and the action shall proceed in the normal manner before the assigned judge.

(b) *Limitation on Evidence.*—At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, except that statements made by a witness at the arbitration hearing may be used for impeachment only.

(c) *Costs.*—If the party who has requested the trial de novo fails to obtain judgment in an amount which, exclusive of interest and costs, is more favorable to that party, costs within the meaning of Rule 265–1 may be assessed against that party.

RULE 505—VOLUNTARY ARBITRATION

Notwithstanding the provisions of Rule 500, the parties to any action or proceeding may stipulate to its referral to arbitration upon such terms as they may agree to, subject to approval by order of the assigned judge. In the case of such referral, the provisions of state and federal law governing voluntary arbitration shall control.

SOUTHERN DISTRICT OF NEW YORK: GUIDELINES FOR OPERATION OF THE VOLUNTEER MASTER PILOT PROGRAM

1. In a suitable case, a district judge participating in the program may assign a special master, who shall be known as the "volunteer special master". Such master shall serve voluntarily, without compensation, and be selected from a panel to be approved by the Chief Judge of the Second Circuit Court of Appeals (in consultation with the Chief Judge of the District and the

participating judges) or,, if not on the panel, by agreement of the parties subject to the approval of the district judge in charge of the case. On such assignment, the parties shall have an unlimited number of challenges for cause and three peremptory challenges per side. Upon receipt of the order of assignment, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of assignment and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence and in accordance with 28 U.S.C. §§ 144, 455 and 458, and with the applicable requirements of the Code of Judicial Conduct.

2. The volunteer special master shall analyze the pleadings and other pertinent papers; discuss at the initial conference the possibilities of mediation and settling the controversy; assist the parties in the preparation of a statement of issues; seek to clarify and narrow the issues involved; seek stipulations of fact; and endeavor to work out with the parties a plan of discovery.

3. The master shall issue a report to the judge on the matters agreed upon by the parties and the matters as to which no agreement could be reached.

4. On the consent of the parties, and the approval of the participating judge, the master may supervise discovery or arbitrate the controversy.

NEW YORK COUNTY LAWYERS' ASSOCIATION,
New York, N.Y., March 3, 1978.

Senate Judiciary Subcommittee, Room 2228, Dirksen Office Building, Washington, D. C.

GENTLEMEN: Please include the enclosed Report To Encourage Arbitration of Civil Cases in United States District Courts in the Record for hearing on S. 2253 on April 11, 1978.

Thank you.

Sincerely,

RICHARD A. GIVENS,
Chairman, Committee on Federal Legislation.

Enclosure.

REPORT NO. F–6 BY NEW YORK COUNTY LAWYERS' ASSOCIATION

(Report on proposed legislation to encourage arbitration of civil cases in U.S. district courts)

RECOMMENDATION: DISAPPROVAL

H.R. 9778, 95th Cong., 1st Sess. (1977), was introduced by Representative Rodino on October 27, 1977, to enact a new Chapter 44 of Title 28 of the United States Code containing provisions for encouragement of arbitration of civil cases in the United States District Courts. The proposed legislation grows out of concern for overcrowded dockets in civil cases. The purpose of the bill, to encourage arbitration in appropriate cases, is praiseworthy, but the methods of doing so under this legislation would appear to present extremely serious problems. For this reason, we are constrained to recommend disapproval of the bill in its present form.

The bill establishes rather minimal qualifications for arbitrators. No detailed qualifications are set forth in the statute, other than that the arbitrators must be lawyers who have been members of the Bar for five years and be determined to be competent. Arbitrators are to be certified by the Chief Judge of each United States District Court, which by local rule establishes a program under the Act. This would undoubtedly be a minor source of judicial patronage. However, the patronage, and more importantly, the recruitment of good arbitrators, is severely inhibited by the minimal fee payable, limited to a maximum of $50 per case regardless of its complexity (proposed section 643 (a)).

More serious, proposed section 644 (a) (2) (B) contemplates reference of substantial numbers of civil suits based on negotiable instruments, contracts, personal injury or property damage involving claims under $50,000 to arbitration without the consent of the parties. This contravenes the concept of

arbitration, which ordinarily involves voluntary submission, with rare exceptions where "compulsory" arbitration is specifically authorized, such as in certain emergency labor disputes. See 77 Stat. 132 (1963), upheld in *Brotherhood of Locomotive Firemen* v. *Chicago, B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C.), aff'd., 331 F. 2d 1020 (D.C. Cir.) cert. denied, 377 U. S. 918 (1964), discussed in S. Rep. No. 459, 88th Cong., 1st Sess. (1963); Marshall, "New Perspectives on National Emergency Disputes," CCH Labor L. J., August 1967, p. 451.

Under proposed section 645, actions subject to arbitration, with certain exceptions, are to be referred automatically by the Clerk unless certain steps are taken, such as the initiation of discovery, a motion for summary judgment, or the like, within specified times. This would penalize parties not wishing arbitration where there were reasonable grounds for delaying taking the specified actions. In addition, the initiation of discovery and like procedures, whether needed or not, would be encouraged where the party does not wish arbitration.

Under section 648, either party has the right to demand a trial *de novo*. This largely defeats the advantage of expedition sought to be attained by arbitration. Monetary penalties are provided against a party who demands a trial *de novo*, but fails to obtain a better result than at the arbitration. This procedure, however, is more adverse to parties less able to withstand the imposition of such penalties, and as such is not equitable.

Section 5 of the bill provides that the procedures involved "shall be implemented on a test basis pursuant to this section for three years in no fewer than five nor more than eight representative districts to be designated by the Chief Justice of the United States, after consultation with the Attorney General." This is inconsistent with the provision in section 641 of the proposed Chapter 44 that "[a] United States district court may authorize by local rule the use of arbitration in accordance with the provisions of this chapter."

If the procedure is to be triggered by local rule adopted by the Judges of a particular Court, this could well occur in a different number of districts than those specified in section 5 of the bill. On the other hand, the bill is not clear as to what would happen if the Chief Justice designates a District, but the Judges of the District fail to adopt a local rule pursuant to Section 641.

The bill thus fails to take full account of the independence of the Judges of individual United States District Courts in establishing local rules, and therefore creates overlapping, inconsistent sources of authority for implementation of the statute.

This Committee recommends that if such legislation is to be adopted, all arbitration authorized be voluntary, and that trials *de novo* not be authorized. Moreover, any test authorized should be controlled by one authority, be it rulemaking by District Courts, or designation by the Chief Justice; unless the local rulemaking is expressly triggered by the designation.

For these reasons, the bill in its present form is disapproved,

Respectfully submitted.

COMMITTEE ON FEDERAL LEGISLATION

Richard A. Givens, Chairman
Edward Arkin
Lawrence Randolph Bailey, Jr.
Edward Brodsky
Evan A. Davis
Robert John Grimm
Michael D. Hess
Stephen D. Hoffman
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Thomas Keogh, Ex-Officio

This report is issued by the Committee pursuant to the By-laws of the Association which permit such dissemination. It has not been submitted to the Board of Directors for approval and therefore does not necessarily represent the views of the Board.

PUBLIC CITIZEN LITIGATION GROUP
Washington, D.C., April 12, 1978.

HON. DENNIS DECONCINI,
Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Washington, D.C.

DEAR SENATOR DECONCINI: We wish to call your attention to a dangerous end-run around the power of Congress to regulate the jurisdiction of the federal courts over constitutional controversies, in which the Department of Justice and the United States District Court for the District of Connecticut are now engaged.

S. 2253, currently pending before the Subcommittee on Improvements in Judicial Machinery, would authorize the adoption of local court rules compelling the submission of certain commercial and personal injury damage claims to arbitration before the parties may bring their complaints to the attention of a federal judge. Without waiting for Congress' determination of the wisdom of that requirement, the Department of Justice has induced three districts of the United States District Court to adopt "experimental" rules that would compel such arbitration. The rule adopted by the District of Connecticut[1] would include not only ordinary statutory and diversity personal injury and commercial litigation, but also damage actions for "police misconduct."

It is very dangerous to begin the process of subjecting constitutional claims to compulsory arbitration. Where the constitutional rights of Americans are at stake, it is important to provide tenured judges to adjudicate disputes and stand as a bulwark for the people against the power of state and federal governments. These matters are simply too important to be left to volunteers or to part-time adjudicators who have not been nominated by the President and confirmed by the Senate.

The apparent justification for inclusion of damage claims under § 1983 for police brutality[2] is that the law in that area is settled and that only simple factual controversies remain to be resolved. Accordingly, says the Department of Justice, trained attorneys amply fill the role of fact-finders; access to a judge, at least at this preliminary stage, is unnecessary.

Certainly the law is clear that police officers enjoy a qualified immunity which confers upon them a good faith defense to § 1983 actions for damages. Yet the good faith element is, in part, a factual surrogate for the policy issue whether the substantive law has become sufficiently clear to warrant the imposition of liability. In addition, the substantive rules of the officers' liability are certainly not settled. For example, there remains substantial dispute about when deadly force is permissible, and the Supreme Court has yet to speak on the issue. Also, issues of police misconduct often involve questions about the content of the constitutional rights with which the police are said to have interfered.

Furthermore, the implicit assumption that questions of law may easily be segregated from questions of fact is simply incorrect. Whenever a general legal standard must be applied to specific cases (negligence is the classic example), there is a movement of cases from factual to legal determinations. After a series of cases in which disputes involving similar facts have been resolved in a certain way, it becomes a matter of law that such cases should be so resolved.

It would thus be a grave error to remove judges from the determination of the legal consequences of the circumstances of each case, because it is those very determinations that establish, over time, the legal consequences of abstract patterns of fact. Arbitrators should not be permitted to usurp such a role in the formulation of the law, and particularly the constitutional law, because the judicial temperament plays a crucial role in that process. Moreover, by cutting off judges from the variety of factual situations in which police brutality is at issue, and by helping judges avoid immersion in repeated patterns of fact, application of a compulsory arbitration rule in this area would hamper the development of the law.

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[1] A copy is attached.

[2] By its terms, the Connecticut rule is much broader. "Police misconduct" could apply not only to excessive use of force, but also to unlawful searches, improper identification procedures, and even improper curtailment of leafletting. The adoption of the rule was apparently stimulated by police brutality cases, but it will be impossible to be certain whether the rule is similarly confined until the local judges have applied it.

The fact that the arbitrators' decision will not be final protects neither the interest of the individual complainants nor the social interest in the development of the law protecting citizens from police misconduct. The rule imposes a major obstacle to litigants that they must overcome before they may present their controversy to a federal judge. Furthermore, the imposition of sanctions for failure to accept the determination of the arbitrator, for which the bill provides at § 649, provides an additional and substantial disincentive to insistence by victims of police misconduct upon a federal judicial determination of their grievances.

The imposition of the Connecticut arbitration requirement by Local Rule is particularly distressing. The district courts are empowered to fill the interstices of the Federal Rules of Civil Procedure pursuant to Rule 83. But this rule is not similar to regulations of admission to and discipline of the Bar, procedures for notice of other parties or of the United States or provisions for security for costs, which are typical of the rules that Rule 83 was intended to authorize. Compulsory arbitration is at least a basic procedural change, if not a regulation of the substantive rights of the parties. Even a rule-making by the Supreme Court might well be beyond the power that Congress has conferred by 28 U.S.C. § 2072. Congressional legislation is thus the preferable route, if the journey is to be undertaken at all.

The Department of Justice's covert extension of its arbitration experiment beyond simple commercial and personal injury litigation to these constitutional cases also arouses concern that this step foreshadows further inroads on the access of Americans to the federal courts for protection of their constitutional rights. It is certainly no secret that certain Justice Department officials are uncomfortable with the existence of § 1983 and would, if unchecked, severely curtail its efficacy. If, in a year or two, the Department concludes that this arbitration "experiment" in police brutality cases was a "success"[3], it may seek to extend the program to prison conditions cases or other categories of constitutional cases in which the plaintiffs are insufficiently popular to withstand the political onslaught of defendants who wish to shield themselves from liability. And if the precedent of legislating by Local Rule is permitted to stand, the Department will not even be required to secure Congressional approval.

Now that there is at last widespread recognition that the Supreme Court has unduly restricted citizens' access to the courts for adjudication of their grievances against government, it is disheartening that the Justice Department is advocating and implementing further barriers to access. And in any event, should these barriers be deemed desirable in constitutional cases, the determination whether or not to raise them should be made by Congress, not by district courts acting by Local Rule.

The Department of Justice should be required to justify both the use of compulsory arbitration in constitutional and civil rights cases, and the authority of the courts to impose any arbitration requirement by Local Rule. We hope that, during the consideration of S. 2253, the Subcommittee will discourage both abuses.

Sincerely yours,

PAUL ALAN LEVY,
For the Public Citizen Litigation Group.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 24, 1978.

Hon. DENNIS DE CONCINI,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, Dirksen, Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to the bill S. 2253, concerning arbitration in the United States District Courts.

The concept embodied in this legislation has my complete support and endorsement. This measure, the diversity of jurisdiction reform as well as the

[3] It is interesting to note that so far no rigorous hypotheses have been formulated against which the success or failure of the "experiment" is to be tested. Accordingly, when the time comes to evaluate the "experiment" the Department will no doubt develop its objectives in order to fit the data.

expansion of the role of the magistrates are measures that will broaden the access of the Federal courts to the American people. There is no doubt that these pieces of legislation will provide the most needed mechanism to expedite the solution of the problems brought before the Federal courts. The adding of new Federal judges is not by itself the solution to clogged Federal courts, although it might well be a key area of importance in the overall picture. However, measures like S.2253 are needed to complement these efforts.

As the bill provides, the court annexed arbitration will be an experiment in five to eight district courts for a three-year period. I hope that once the experiment is concluded, the ensuing report to Congress will make this idea a permanent one. The 95th Congress will be remembered as one of the most diligent in finding practical solutions to the urgent and pressing problems of the U.S. District Courts. For said reason I want to commend your Subcommittee and the full Committee for their dedicated efforts.

I trust that the full Committee will report S.2253 favorably and that this program will be implemented at the earliest possible date.

Cordially,

BALTASAR CORRADA,
Member of Congress.

U.S. SENATE,
Washington D.C., June 19, 1978.

Re S. 2253—Compulsory Arbitration in the Federal district courts.

Hon. GRIFFIN B. BELL,
Attorney General of the United States,
Department of Justice,
Washington, D.C.

DEAR JUDGE BELL: On Wednesday, May 24, 1978, the Federal Judicial Center hosted an all-day discussion on S. 2253. Those in attendance discussed the similarities and differences of three district courts now testing compulsory non-binding arbitration by local rule and other relevant matters. It is my understanding that a comprehensive summary of the meeting is currently being prepared by your staff.

The Subcommittee is anxious to move forward on this legislation and would like to incorporate this comprehensive document into the hearing record. With this in mind, this is a request that this document and other reports which were referenced in your statement of April 14, 1978, be forwarded to the Subcommittee at your earliest convenience.

Thank you for your cooperation.

With kind regards.

Sincerely,

DENNIS DECONCINI, *Chairman.*

REPORT OF THE CONFERENCE ON ARBITRATION UNDER LOCAL RULE, HELD AT FEDERAL JUDICIAL CENTER

AGENDA

10:00 a.m.: Introduction and Opening Remarks by Assistant Attorney General Daniel J. Meador.

10:15 a.m.: Reports from the Chief Judge and Clerk of the three pilot Districts Courts on project status.

11:40 a.m.: Report by evaluators.

12:00 a.m.: Luncheon at the Federal Judicial Center.

1:30 p.m.: Discussion on the arbitration process:

I. Selection of cases: (*a*) Classes of cases; (*b*) Excepting of individual cases.

II. Selection of arbitrators: (*a*) Court panel; (*b*) Individual case panels.

III. Compensation of arbitrators.

IV. Procedures: (*a*) Time periods; (*b*) Case supervision from filing to referral; (*c*) Procedures for setting hearing and notifying the parties; (*d*) Hearing procedures; (*e*) Procedures for demanding trial de novo; (*f*) Disincentives to appeal.

PARTICIPANTS

Hon. Joseph S. Lord, Chief Judge, U.S. District Court for the Eastern District of Pennsylvania.
Hon. Raymond Broderick, Judge, U.S. District Court for the Eastern District of Pennsylvania.
Michael Kunz, Chief Deputy Clerk, U.S. District Court for the Eastern District of Pennsylvania.
Frank Shields, Esq., Philadelphia Bar Association.
Hon. T. Emmet Clarie, Chief Judge, U.S. District Court for the District of Connecticut.
William Templeton, Clerk, U.S. District Court for the District of Connecticut.
Peter Adomeit, Esq., Professor, University of Connecticut Law School.
Hon. David N. Edelstein, Chief Judge, U.S. District Court for the Southern District of New York.
Hon. William Peckham, Chief Judge, U.S. District Court for the Northern District of California.
Hon. William Schwarzer, Judge, U.S. District Court for the Northern District of California.
Jay Schaefer, Law Clerk to Judge Peckham.
William Wittaker, Esq., Clerk, U.S. District Court for the Northern District of California.
David M. Dixon, Esq., Senate Committee on the Judiciary.
Michael Altier, Esq., Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary.
Michael Remington, Esq., Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary.
William Eldridge, Esq., Director of Research, Federal Judicial Center.
John Schappard, Federal Judicial Center.
Jeff Morris, Esq., Special Assistant to Mark Cannon.
Diane Cole, Esq., Administrative Office of the U.S. Courts.
Daniel J. Meador, Assistant Attorney General, U.S. Department of Justice.
Paul A. Nejelski, Deputy Assistant Attorney General, U.S. Department of Justice.
John M. Beal, Attorney, U.S. Department of Justice.
Jane P. Danowitz, Law Clerk, U.S. Department of Justice.

REPORT

The morning session of the Conference was devoted to descriptions of the experimental programs in the District of Connecticut, the Eastern District of Pennsylvania and the Northern District of California. The Chief Judges and Clerks from the three districts outlined the local rules of their courts that govern arbitration procedures and reported on the current status of the pilot programs. Very preliminary figures show that approximately 10 percent of cases filed in Northern California are being referred to arbitration, 5 percent in Connecticut and 35 pecent in Eastern Pennsylvania. The higher figure in Pennsylvania may reflect the fact that the bar is not fully aware yet that all cases in the categories named in the local rule (regardless of the amount in controversy) are automatically referred unless the attorney of record specifically requess otherwise.[1] (Copies of the local rules of the three district courts are attached.) The reports were followed by a summary report by staff of the Federal Judicial Center on the criteria and procedures that will be employed to evaluate the pilot programs.

Luncheon guests included Chief Warren E. Burger, Attorney General Griffin B. Bell and Senator Dennis DeConcini, Chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. All three made brief remarks. William Foley, Director of the Administrative Office of the United States Courts, and Mark Cannon, Administrative Assistant to the Chief Justice, also attended the luncheon.

The afternoon session of the conference was devoted to a detailed discussion of each major aspect of the arbitration process, comparing the provisions of the local

[1] Chief Judge David Edelstein, of the Southern District of New York, explained the volunteer masters program which has been developed in the southern district to facilitate the effective and fair disposition of litigation in that district through the use of volunteer masters performing a variety of tasks, including arbitration in selected cases. A brief outline of the volunteer masters program is attached.

rules and the arbitration legislation pending in the Congress (S. 2253, H.R. 9778). The main points made in these discussions are described below.

I. Selection of cases

(*a*) *Classes of cases.*—The local rules and the proposed statute provide for the referral to arbitration of the following categories of civil actions in which only money damages are sought (not in excess of $100,000 in Connecticut and Northern California, and not in excess of $50,000 in Eastern Pennsylvania and in the proposed statute).

A. Cases in which the United States is a Party:

Legislative Proposal: The Attorney General is directed to designate the classes of U.S. Party cases to be referred to arbitration.

Connecticut: Federal Tort Claims Act cases.

Eastern Pennsylvania and Northern California: Federal Tort Claims Act and Harbor Worker and Longshoreman Act cases, and Miller Act cases where the United States has no monetary interests.

B. Cases in which the United States is not a Party:

Legislative Proposal: Federal question, diversity, and admiralty jurisdiction tort and contract cases.[2]

Connecticut: Diversity jurisdiction contract and tort cases; in addition civil rights jurisdiction police misconduct cases.

Eastern Pennsylvania: Federal question and diversity jurisdiction contract cases and diversity and admiralty (including Jones Act) jurisdiction tort cases.

Northern California: Federal question, diversity and admiralty jurisdiction tort and contract cases.

The Eastern Pennsylvania rule and the legislative proposal provide that private parties with money damage only cases of any type or amount may consent to arbitration. Connecticut allows any private party case to be referred to arbitration with the consent of the parties. In Northern California, only cases in the categories included in the jurisdictional section of the local rule may be referred to arbitration.

The discussion focused primarily upon the differences in the classes of cases included and excluded under the three local arbitration rules. The types of cases subject to arbitration in each district are similar with a few exceptions. Connecticut, for example, excludes from arbitration private party federal question cases and includes actions for police misconduct. Such actions are not included under either the Pennsylvania or California district court rules. It was generally agreed that it was too early to evaluate fully the merits of the differing rules and that experience with the pilot programs will reveal what types of cases are best suited for arbitration.

At the same time it was agreed that the inclusion of certain classes of cases for arbitration might well be the source of serious opposition to any legislative proposal, particularly should they include sensitive areas such as civil rights.

(*b*) *Excepting of individual cases.*—In the Northern District of California a judge may exclude from arbitration a case which normally would be referred under the rules of the court. That might be done if the case involved critical points of law, if a decision would set an important precedent, or if the case required witnesses to travel long distances.

The Connecticut rule permits exclusion of cases of such complexity that the arbitration hearings are unlikely to be concluded within two days. It was generally agreed that courts should have limited discretion to except from arbitration particularly inappropriate cases.

II. Selection of arbitrators

(a) *Court panel.*—In the District of Connecticut the initial court panel of arbitrators was selected through an invitational mailing from Chief Judge Clarie to approximately 300 members of the Connecticut Bar. Of the 300 lawyers invited, so far 212 have accepted and 24 have declined.

In the Eastern District of Pennsylvania, arbitrators were sought through an open letter from the Philadelphia Bar Association. So far, 430 lawyers have applied, of whom 100 have already been certified by the court.

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[2] Per amendment proposed by the Department of Justice Apr. 14, 1978, at hearings before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery.

In the Northern District of California, the solicitation for arbitrators was made through local bar associations and through application forms published in local legal newspapers allowing lawyers to submit their names, legal backgrounds, and experience directly to the court. Most of those who have so far applied have been found to be qualified and placed on the clerk's list of potential arbitrators.

It was generally agreed that the court arbitration panels should be limited to attorneys with a reasonable amount of experience. The three local rules and the legislation require an attorney to have five years of experience to qualify. This standard was generally acceptable to the conferees, although there was some sentiment for requiring greater experience. It was agreed that only attorneys should be named to the court panels.

One issue concerning arbitrator selection which arose was how to balance expeditious panel selection and party satisfaction. The Connecticut and Northern California rules allow each party to eliminate a certain number of persons from a randomly selected list of potential arbitrators and then indicate their order of preference for those persons remaining. In Eastern Pennsylvania, the arbitrator or arbitrators are selected by the clerk through a random selection process from persons certified by the court. The Philadelphia Bar Association has assisted the court by identifying those certified as either plaintiff or defendant attorneys, or not identifiable as either. One attorney is randomly selected from each group for each case panel.

The proposed legislation directs the clerk to select at random a panel of three arbitrators for each case unless the parties have selected their own arbitrator. It was generally agreed that for the time being the process for selection of individual panels should be left to the individual district courts in order to gain experience.

III. Compensation

In Connecticut, under section 3 of Rule 28, the arbitrators serve without compensation, except (section 7a) that if an arbitration hearing is not concluded within two days, the hearing may proceed only if the parties agree to share the cost of $250 per day per arbitrator thereafter.

Section 2 of the Eastern Pennsylvania rule provides that the chairman of the arbitration panel shall be compensated $70 and the other two arbitrators $40 per case. If the parties agree on a single arbitrator, that individual shall be paid $70 per case.

In Northern California, Rule 500–4(e) provides that arbitrators shall be paid $75 for each day or portion of a day of a hearing in which they participate.

Compensation for arbitrators was a topic of considerable discussion. The two primary views were:

(1) Either arbitrators should not be compensated at all, or the compensation should be "reasonable," i.e., the going hourly rate for lawyers in the area who practice before the federal court; and

(2) Some compensation should be provided in order to attract arbitrators from a broad cross-section of the bar, including younger attorneys who might not be able to serve unless compensated.

With regard to the second point, some participants expressed the view that diversity in the backgrounds of the arbitrators is not as important a factor as competence and quality. There was consensus among the judges from the four districts that under any proposed legislation, the court should have discretion in setting the fee for arbitrators in their districts, at least during the experimental stage of the program.

IV. Procedures

Procedures for prearbitration supervision, setting the hearing, and notifying the Parties.—The three districts have substantially different procedures for the supervision of the case from filing to arbitration, the setting of the arbitration hearing, and notification to the parties. Eastern Pennsylvania and the proposed legislation have automatic referrals at the conclusion of set time periods that allow for motions on the pleadings to be resolved and up to 120 days of discovery to be conducted. The clerk has the primary responsibility for monitoring the case and setting up the hearing during this time. In Northern California, the judge to whom the case is assigned plays a larger role, while in Connecticut, the magistrate is assigned to supervise the case during the pre-arbitration period.

Most of the comments regarding procedures for setting hearings and notification of the parties were made by the participants from the Eastern District of Pennsylvania. They reported that it had become apparent that the time period within which the hearing must be held after referral to arbitration is too short and has proven impractical for the court to administer properly. The 15-day notice requirement for a hearing allows only 15 days for the selection of arbitrators if the 30-day limitation for the arbitration hearing is to be met. Moreover, under section 4(b) of the Eastern Pennsylvania rule, the parties have seven days after an action is referred to arbitration to select their own arbitrator before an arbitrator or arbitrators are chosen by the clerk. Thus, in many instances, the clerk has only seven days within which to select arbitrators. Following a discussion of the matter, there was general agreement that no single set of procedures for the pre-arbitration period is clearly superior. Each district desired to continue for the time being with the process it had developed to see how well it works in practice.

Prearbitration discovery.—Under section 5(b)(3) of the Connecticut rule, discovery may be conducted until 90 days after the filing of the answer, or the ruling of the court on any motion filed under section 5(b)(1), whichever is later.

Under section 4 of the Eastern Pennsylvania rule, 120 days from the filing of the answer are allowed for discovery.

In Northern California, discovery may be permitted for up to 100 days after referral to arbitration but before the hearing. (Rule 500–5).

There were some different points of view among the participants regarding the length of time that should be permitted for discovery. One Philadelphia participant felt that Pennsylvania's 120-day period was too short for many complex cases. Another pointed out that the court so far had received only two complaints that the length of time for discovery was not adequate. It was also noted that according to a recent Federal Judicial Center study, of several thousand civil actions, 90 per cent terminated with fewer than six discovery requests. The study also found that 50 percent of cases terminated with no known requests for discovery.

The view was also expressed that if the time permitted for discovery was too long or too open-ended, a further burden would be placed on litigants and the value of the arbitration procedure would be substantially diminished. There was general agreement that there should be some limitation on the time permitted for discovery under any arbitration rule. However, there was also support for the view that a provision should be included which would allow the judge, under unusual circumstances, to extend the time limit.

Hearing procedures.—The main area for discussion regarding hearing procedures was the degree to which the Federal Rules of Evidence should be used. The three local rules and proposed legislation all provide that the Federal Rules of Evidence serve as a guide for the admissibility of evidence rather than as binding rules. Representatives from the three pilot districts agreed that this was a satisfactory procedure. It was recognized that it is important to encourage an atmosphere of relative informality in order to achieve the desired expedition and restraint on costs.

Disincentives to appeal.—The three pilot districts have taken different approaches on disincentives. Connecticut's rule provides no disincentives to either party if they demand a trial de novo. At the other extreme, section 7(d) of Eastern Pennsylvania's rule provides a mandatory assessment by the court against the party who demanded the trial de novo if he fails to obtain a court judgment (exclusive of interest and costs) more favorable to him than the arbitration award. That assessment is the amount of the arbitration fees, and, if the party is a defendant, he shall pay to the plaintiff interest on the arbitration award at the current rate of interest from the time the award was entered. Northern California took the middle approach. According to Rule 500–7(c), if the party who has requested the trial de novo fails o obtain a judgment which, exclusive of interests and costs, is more favorable to that party than the arbitration award, costs may be assessed against that party.

The question of whether court rules should discourage a trial de novo and if so, how strongly they should do so, was not resolved during the discussion. There was recognition that strong disincentives against a trial de novo could raise Constitutional questions. It was also suggested that the high cost of attorneys fees for a trial de novo constitutes disincentive enough and that a specific disincentive provision might not be necessary.

OFFICE OF ATTORNEY GENERAL,
Washington, D.C., June 28, 1978.

Hon. DENNIS DECONCINI,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of June 19, 1978, regarding the arbitration legislation. I understand that earlier this week Assistant Attorney General Meador sent the Subcommittee the materials mentioned in your letter.

I am pleased to know that your Subcommittee is moving forward with this legislation, which will enable the federal district courts to provide litigants with an expeditious, low cost mechanism for the settlement of certain types of disputes. If I can be of further assistance, please do not hesitate to let me know.

Sincerely,

GRIFFIN B. BELL,
Attorney General.

THE DEFENSE RESEARCH INSTITUTE, INC.,
Milwaukee, Wis., July 11, 1978.

Re S. 2253.

Hon. DENNIS DECONCINI,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR DECONCINI: Enclosed please find a statement of the position of the Defense Research Institute on S. 2253, the bill pertaining to arbitration in federal court. We hope that our comments will be given due consideration.

Sincerely,

STEPHEN L. LIEBO,
Assistant Research Director.

Enclosure.

STATEMENT OF THE DEFENSE RESEARCH INSTITUTE

INTRODUCTION

The Defense Research Institute is a national organization of more than 6,300 individual defense attorney members and more than 500 corporate members. We are concerned with all aspects of the defense of civil litigation and seek to improve the administration of justice.

The Board of Directors of the Defense Research Institute, at its July, 1978 meeting, directed the writer Thomas J. Weithers, as President, to communicate its views on S. 2253, proposing a system of arbitration in federal district courts.

The Defense Research Institute has long supported the mandatory arbitration of small civil claims where court congestion exists. [See, DRI monograph, Responsible Reform, An Update (Vol. 1972 No. 3, March 1972.; DRI monograph, Medical Malpractice Position Paper (An Update) (Vol. 1976 No. 3, March 1976).] Nonetheless, the Defense Research Institute believes that S. 2253 contains so many flaws of an important nature that it should not be adopted without complete committee hearings, and that federal district conrts should not be allowed to adopt the arbitration system set out in S. 2253 until the test called for in section 5 of the bill has been completed and the results of the test have been submitted to Congressional and public scrutiny.

The inadequacies of the bill and the problems created by them which lead us to find the bill unacceptable follow. Our comments are necessarily brief and incomplete due to the change in deadlines imposed by the subcommittee. Originally informed that the subcommittee would hold hearings on August 1, 1978 and would accept written statements until July 24, we learned shortly before our July Board of Directors meeting that the hearings had been cancelled and the deadline for submission of statements advanced to July 12. Acknowledging the late-hour changes and because there will be no further hearings, we submit these comments for entry into the public record.

SECTION 2—"VOLUNTARY ARBITRATION"

The reference to encouragement of voluntary arbitration in section 2 (p. 2 line 2–3) is deceptive. The greater part of the arbitration called for in this bill is compelled arbitration—mandatory even though neither party desires it. Although

parties have access to trial de novo, they must first undergo the expense of arbitration. Thus, to eliminate possible confusion with the traditional voluntary, binding arbitration, the bill should be relabeled. [See statement of Robert Coulson, American Arbitration Association president before U.S. Senate Subcommittee Hearing on S. 2253, Washington, D.C., April 14, 1978, in 101 N.J.L.J. 625 (June 22, 1978).]

SECTION 3—RESTRICT TO TEST COURTS

S. 2253 both sets up a test of the arbitration system it proposes (sec. 5) and at the same time allows any federal district to adopt the system at is unfettered discretion. We consider this dual function both precipitate and imprudent.

The arbitration system proposed in S. 2253 may have substantial ramifications for the entire process of litigation in federal courts. By proposing a three year test of the system in selected courts, S. 2253 itself recognizes that the effects of the system, both beneficial and harmful, are unknown.

Implicitly acknowledging the uncertainties, S. 2253 charges ahead and permits any federal district to adopt the system. By doing this it makes guinea pigs of all federal courts and the parties using them. We do not think the rights of parties or the business of courts should be treated in this manner.

The bill creates a perfectly logical test of the system and provides for Congressional review of the results at the conclusion of the test. It is both logical and wise to defer widespread application of the system until Congress has analyzed the test results.

At that time, if the benefits of the system outweigh its harmful effects, Congress can then responsibly apply it generally. Also at that time, Congress can determine the effects on court congestion of other legislative proposals currently being considered. Any other system, including the means proposed by S. 2253, is precipitate and irresponsible. While some federal courts may be troubled with congestion, the problem is not so severe that instantaneous application of an untested system is merited.

SECTION 641—CONGESTION NECESSARY

A federal district court should not be allowed to authorize arbitration unless congestion is present. The primary underlying rationale of the arbitration system proposed in S. 2253 is the elimination of court congestion. By allowing the adoption of this system in courts which have no congestion, S. 2253 extends beyond its purpose. We find this unacceptable. This system of arbitration should not be imposed upon litigants in the absence of great judicial need.

To be consistent with its purpose, S. 2253 should limit the availability of arbitration to congested district courts and congestion should be defined in the statute. Rational determination of appropriate congestion requires close consideration and full committee hearings.

The second stated purpose supporting S. 2253, the inexpensive resolution of disputes, is an assumption which lacks proof at the $50,000 award levels proposed by S. 2253. It is not unlikely that parties with $50,000 at stake will routinely demand access to a jury. If so, the system proposed will result in additional expense to parties and administrative burden to courts. Thus, the decision to base the wholesale application of arbitration to federal litigants on this ground must await information about whether it will truly be less expensive. Again, full committee hearings should be held and general application of this section deferred until test results are available.

SECTION 642—CERTIFICATION OF ARBITRATORS

This section is objectionable because it is unclear and it provides chief district judges with unrestrained discretion susceptible to abuse. As a minimum, the provisions of this section pertaining to certification of arbitrators must be altered in a manner which will ensure that the court certifies a sufficient number of arbitrators from a sufficiently broad scope of attorneys so that a true random pool of arbitrators exists, and that the attorneys in the pool will not be called upon to arbitrate so often that the duty becomes burdensome.

Two specific provisions of this section which we find objectionable are those governing certification [secs. 642(b)(2) and (f)] and conflict of interest [sec. 642(c)]. The determination of competence by the certifying court [sec. 642(b)(2)] is too broad, leaving excessive discretion in the district court. Guidelines for the

determination of competence must be specified. Also, certification for a period of four years [sec. 642(f)] should be replaced by annual certification.

The conflict of interest provision [sec. 642(c)] contains a highly objectionable ambiguity in lines 16–19 of page 3. The broad language of the provision could be interpreted in an oppressive manner. Conceivably, by participating in an arbitration, and arbitrator could be barred and could bar his law partners and associates from ever representing a party to the arbitration on an issue he arbitrated. Thus, if an insurance company is a party to arbitration over an insurance policy provision and the insurer is a client of the arbitrator (but is not represented by the arbitrator in the arbitration in question) the arbitrator would conceivably be barred from representing the insurer on the same policy issue at any time in the future.

As a result, the arbitrator can lose clients merely because he was assigned a particular arbitration. The possible economic hardship to attorneys is unreasonable and inequitable. Consequently, the language of this provision must be altered to at most bar the arbitrator or his firm from representing a party in the same proceeding, or an action on the same issue between the same parties.

SECTION 643—INADEQUATE COMPENSATION

The maximum $50 per case compensation granted arbitrators is unreasonably low. Assuming the maximum $50 per case is granted, the amount is economically questionable for the arbitrator in a one day arbitration. It becomes entirely inadequate when the arbitration takes longer than one day. Extended arbitrations do not appear unlikely, especially in light of jurisdiction which includes Miller Act cases and unknown future types of actions made submissible by the Attorney General.

While members of the bar do not shrink from performing functions not fully compensated for the good of the judicial system, they should not be asked to bear the severe financial deprivation which might be called for by this section. As a minimum the compensation should be based upon a daily rate, and the courts should be allowed to grant no less than the $50 rate. We also suggest that compensation of arbitrators be increased to a level more commensurate with the abilities of the attorneys called to arbitrate.

SECTION 644—JURISDICTION

We find unacceptable the referral to arbitration of two types of cases under this section: the power of the Attorney General to refer unspecified types of cases in which the United States is a party; and the $50,000 money damage ceiling.

Congress alone should have the authority to choose the types of cases for which arbitration is made mandatory. The Attorney General should not be allowed to do so under a general grant of power. There is already too much government by administrative agencies, which unlike Congress, are not directly responsible to the will of the people. Especially in light of the broad definition of cases in which the United States is a party in section 649(e), the grant of unfettered authority to the Attorney General to make cases referrable to arbitration allows broad expansion of mandatory arbitration without the safeguards provided by the legislative process.

The $50,000 ceiling on claims referrable to arbitration is entirely too high. The Defense Research Institute has long favored arbitration where congestion exists, but our support of arbitration extends only to small claims. The amount we have proposed has never exceeded $3,000. We realize that this amount would effectively negate federal arbitration, but we also believe that the $50,000 money damage ceiling unacceptably takes claims out of the realm of arbitrable small claims.

We limit our approval to small claims because we recognize the inherent weaknesses of arbitration as a means of deciding claims. These weaknesses include relaxation of the rules of evidence, the means by which arbitrators are selected and the tendency of panels to reach compromise awards. While these weaknesses will not cause parties to small claims to seek a full trial, there is a claims size at which the amount at risk is sufficiently large that parties can be expected to regularly seek a jury determination of the claim. We believe that $50,000 money damages involves a claim of the size for which trial de novo will regularly be sought, making the arbitration merely an added cost and delay in resolution of a claim.

SECTION 648—TRIAL DE NOVO

Under the circumstances presented by S. 2253 the availability of trial de novo is unwise. Given that under this bill arbitration is mandatory and the damage ceiling high, parties may choose to use arbitration as a tactical weapon on the road to the eventual trial de novo. Parties may enter arbitration with a minimally prepared and presented case, caring more about what they learn about their opponents case and weaknesses than the arbitration. Since they have not presented their full case, they have little fear of receiving an award inferior to that obtained in arbitration.

The result of the availability of arbitration as a tactical tool would be increases in costs to parties and courts, delay and trial by gamesmanship. In short, coupling the mandatory arbitration system proposed in S. 2253 with trial de novo may result in expansion of the evils sought to be eliminated.

OTHER OBJECTIONS

Section 645(b)—The seven day period in which to choose arbitrators is too short.

Section 646(c)—The rules of evidence should not be laid aside when the amount of damages at stake is so high.

Section 646(d)—The necessity of providing the opposing party a transcript at no charge when a party wishes to record the arbitration is burdensome, especially if the only reason this requirement exists to to deter records.

Section 647—The arbitrators should be required to file their award within thirty days of the termination of arbitration.

Section 648(a)—Trial de novo should not be available to parties who consented to arbitration under section 644 (a) (2) (A).

Section 648(d)—A plaintiff whose judgment fails to exceed his award should be required to pay costs of arbitration to the defendant rather than the court. It is inequitable to require the defendant to pay the plaintiff, while the plaintiff pays the court.

Section 7(b)—The report on the "use, effectiveness and benefits of arbitration" in test district courts should be published and public hearings on it should be held.

CONCLUSION

The Defense Research Institute appreciates the efforts of Congress and the courts to expedite litigation and make it less costly. We have long supported mandatory arbitration of small claims to meet these same goals. For the reasons we have set out, however, we believe that S. 2253 fails to effectuate these goals. By limiting applicability of the arbitration system proposed in S. 2253 to test courts during the test period and through further honing of the provisions of the bill pursuant to comments received, the goal can be reached.

STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION FIDELITY AND SURETY COMMITTEE

The American Insurance Association is an organization of 147 insurers writing all lines of property and casualty insurance throughout the United States. The AIA members issue fidelity and surety bonds and account for approximately 70 percent of all the Miller Act bonds written on federal government contracts. An exact figure is not available because separate data is not collected on Miller Act premiums.

Section 644(a) (2) of the amended bill would require arbitration of Miller Act claims (40 U.S.C. 270(b)) and would in our opinion increase the numbers of federal contract bond cases requiring jury trials. Present law requires contractors on public works to post surety bonds on all contracts in excess of $2,000. The payment bond required for the benefit of laborers, subcontractors and material suppliers is taken as a reasonable substitute for a mechanics lien on private construction contracts.

The Miller Act grants a direct right of action in Federal court by the laborers subcontractors or material suppliers against the surety which issued the payment bond. However, as may be seen from the annexed exhibit, Miller Act cases represent a minuscule part of the yearly case load in the U.S. District Court. As an example, in 1975 and 1976 only 61 Miller Act cases were tried each year of the 117,320 civil cases commenced in 1975 and 130,597 started in 1976.

The principal reason Miller Act cases do not clog the calendar is the ability of the surety to reach the real party in interest. Many cases are promptly settled because a surety is able to exercise its rights under cross idemnity agreements, standby letters of credit, collateralization agreements and personal indemnity agreements.

Suretyship is not insurance. The payment of a bond premium does not shift the risk of loss from the contractor to the surety. The contractor as principal under the surety bond remains liable for the payment of the unpaid material suppliers and subcontractors claims. When a claim is received on a Miller Act Bond, a surety will vouch in by third party complaint all persons who may be liable to the surety for exoneration or indemnification. If the surety fails to vouch in all such third parties any judgment against the surety is not conclusive evidence of the liability and quantum of damages in subsequent suits for indemnification. See *United New York Sandy Hook Pilots Association* v. *Rodermond Industries, Inc.* 394 F2d 65, 72–73 (3rd cir. 1968). These third party rights are grounded on cross indemnity agreements, standby letters of credit and agreements of personal indemnity.

Very few Miller Act cases have required jury trials. In our opinion, confidence in the Federal Judiciary is the principal reason indemnitors do not demand jury trials as is their right under 7th Amendment to the U.S. Constitution.

Any attempt to transfer responsibility for judicial decisions from federal judges to attorneys in private practice will be met with a waive of demands for de novo trials forcing greater expenses on the surety industry.

The objective of the bill is to reduce the civil case load being handled by the federal bench. However, the Miller Act cases only amount to 61 cases out of 130,500 cases per year. Since arbitration under the bill only takes place after 150 days from the filing of the answer (sec. 645) all of the discovery and motion practice will continue to occupy bench time of the federal courts. As we add parties to the proceedings, i.e., indemnitors, guarantors, banks and the like, we increase chances that someone will demand a jury trial. The surety industry is concerned that a lack of confidence in arbitrators who have a private law practice will accelerate the de novo trial demands.

Certainly some improvement in handling Miller Act cases is possible. Perhaps an expansion of Federal Civil Rule 53(b) on the employment of Special Masters could prove of assistance. Under such a system the fact collection process could be accelerated with the final decision reserved to the court. All parties would have the right to except from the findings of fact by the Special Master. Indeed this reservation of the judicial function to a federal judge appointed for life is far better than vesting the function in a lawyer whose future clients could include the present litigants.

Accordingly, the AIA Committee on Fidelity and Surety urges the bill S. 2253 be amended to exclude Miller Act cases.

COMPARISON OF MILLER ACT CASELOAD TO TOTAL FEDERAL CASELOAD FIGURES TAKEN FROM ANNUAL REPORT OF THE DIRECTOR THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

	1972	1973	1974	1975	1976
Case commenced by year:					
Total civil cases	96,173	98,560	103,530	117,320	130,597
Miller Act Cases	572	553	646	1,037	955
Terminated cases: Total Miller cases removed from calendar	761	579	632	801	901
Case not requiring court action	484	358	378	537	555
Cases requiring court action	277	221	254	264	346
Miller Act cases tried—					
By court alone	62	59	69	54	54
By jury	3	12	4	7	7

REPORT ON ARBITRATION EXPERIMENT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I. THE ARBITRATION EXPERIMENT

In an effort to improve the speedy, effective and fair disposition of litigation, the United States Department of Justice proposed as an experiment the use of arbitration in cases involving $50,000 or less.

Out of the 94 Districts in the United States, the Eastern District of Pennsylvania has been honored by being selected as one of the three Districts for a trial program of arbitration. Our court has agreed to participate, and to that effect has adopted Local Rule 49 published in the Legal Intelligencer of February 2, 1978. A copy of the rule is attached. (Exhibit A.) The program by its terms became effective on February 1, 1978, for a period of one year.

In order to lend dignity to the proceedings and to accommodate parties and witnesses, the hearings will be held in an United States Courtroom.

II. CASES ELIGIBLE FOR ARBITRATION

The following cases are eligible for arbitration:

All cases filed after February 1, 1978, in which:

1. The United States is a party, and only money damages are sought, and the damages do not exceed $50,000, exclusive of interest and costs, and the action is brought under the Federal Tort Claims Act, or the action is brought under the Longshoremen and Harbor Workers Compensation Act, or the action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. sec. 270(b)), and the United States has no monetary interest in the claim.

2. The United States is not a party and only money damages are sought and the damages do not exceed $50,000, exclusive of interest and cost and jurisdiction is based in whole or in part on:

(a) Title 28, U.S.C. sec. 1331 and the action is brought pursuant to Section 20 of the Act of March 4, 1915, as amended (Title 46, U.S.C. sec. 688);

(b) Title 28 U.S.C. section 1331 or 1332 and the action is based on a negotiable instrument or contract;

(c) Title 28, U.S.C. section 1332 or 1333 and the action is for personal injury or property damage.

III. PROCEDURE IN CLERK'S OFFICE TO IDENTIFY ARBITRATION CASES

Upon the filing of the complaint a copy of the statistical form (JS44c) and the docket sheets are furnished to the arbitration deputy clerk who then determines from the complaint and the designation form. (Exhibit B.) whether the case is eligible for arbitration. The designation form contains an "Arbitration Certification" which must be executed by the attorney filing the complaint certifying in cases otherwise eligible for arbitration that damages exceed $50,000. If the case is eligible for arbitration the courtroom deputy's copy of the docket sheet is stamped as follows: "ELIGIBLE FOR ARBITRATION"

The copy of the docket sheet is then forwarded to the courtroom deputy of the Judge to whom the case has been assigned.

IV. THE $50,000 DAMAGE CERTIFICATION

Local Rule 49 provides that in all cases otherwise eligible for arbitration damages shall be presumed to be less than $50,000, unless counsel for the plaintiff at the time of filing the complaint executes a certification that the damages claimed in the complaint exceed $50,000. or counsel for the defendant at the time of filing a counterclaim executes a certification that the damages claimed in the counterclaim exceed $50,000. or counsel filing a third party complaint at the time the third party complaint is filed executes a certification that the damages claimed in the third party complaint exceed $50,000. This certification is set forth in the designation form. (exhibit B.)

In those cases where a counterclaim or a third party complaint is filed and damages are certified to be in excess of $50,000 the courtroom deputy shall stamp the court's copy of the docket sheet: "Damages Certified in Excess of $50,000."

V. WHEN A CASE IS REFERRED TO ARBITRATION

Cases eligible for arbitration shall automatically be referred to the arbitrators by the Judge to whom the case has been assigned acting through the courtroom deputy clerk as soon as possible after a 20 day period which shall commence to run when an answer is filed. in the event a counterclaim is filed, the 20 day period does not begin until the answer to the counterclaim is filed. In the event a third party is brought in, this 20 day period does not begin until the answer of the third party is filed.

A case eligible for arbitration shall not be automatically referred to the arbitrators after the 20 day period from the filing of the answer, if:

1. Discovery has commenced within the 20 day period and the court is so notified. Such a case will be referred to the arbitrators when discovery is completed or upon the expiration of 120 days from the filing of the answer, whichever occurs earlier;

2. A party has filed a motion for judgment on the pleadings, summary judgment or similar relief. Such a case will not be referred to the arbitrators until the court has denied the motion for judgment. The filing of such a motion after the case has been referred to the arbitrators shall not stay the arbitration proceedings unless the Judge so orders.

VI. PROCEDURE IN CLERK'S OFFICE REFERRING CASES TO ARBITRATION

Cases eligible for arbitration shall be monitored on a regular basis by the Clerk's office. A master list for this purpose will be maintained in the arbitration section of the Clerk's office. For monitoring purposes eligible cases shall be referred to arbitration on the following basis:

1. Cases in which 20 days have elapsed from the filing of the answer and the court has not been notified that discovery has commenced shall be referred to the arbitrators.

2. Cases in which the court has been notified that discovery has commenced within the 20 day period from the filing of the answer shall not be referred to the arbitrators until either discovery is completed or 120 days have elapsed from the filing of the answer. The Judge to whom the case is assigned (acting through the courtroom deputy) shall advise the arbitration deputy of those cases where discovery has been completed prior to the expiration of 120 days from the filing of the Answer.

3. Subsections 1 and 2 shall apply to cases wherein a counterclaim or third party complained has been filed except that the 20 day period shall commence to run from filing of the answer to the counterclaim or the answer to the third party complaint.

4. Cases eligible for arbitration in which a motion for judgment on the pleadings, summary judgment or similar relief has been filed prior to referral to arbitration, shall not be referred to arbitration until the court has denied the motion for judgment. The courtroom deputy shall advise the arbitration deputy immediately when the Judge rules on the motion.

VII. SELECTION OF ARBITRATORS

A list of attorneys certified by the Chief Judge to serve as arbitrators will be maintained in the office of the Clerk of the Court. A copy of the Certification Order is attached. (Exhibit C.) The arbitration deputy clerk will select at random the names of three persons who will serve as arbitrators. This will be done in the following manner:

1. The list of arbitrators will be divided into three categories:
   (a) Attorneys whose practice is principally representing plaintiffs;
   (b) Attorneys whose practice is principally representing defendants;
   (c) Attorneys whose practice is not identified as either of the above.

2. Numbered discs corresponding to numbers on the master list of attorneys certified to serve as arbitrators will be divided in accordance with the aforementioned three categories and placed in three separate boxes.

3. For each case referred to rabitrators one disc will then be selected from each of the three boxes.

4. The three discs will then be placed in a box and the first person randomly drawn will be designated chairman of the arbitration panel.

5. The arbitration deputy cleark shall immediately contact the arbitrators by telephone and obtain a date within a period of 30 days when the three arbitrators will be available to hear the case. The date for the hearing must be a date which will permit the giving of notice of the hearing to the parties at least 15 days prior to the date set for the arbitration hearing. When such a date is obtained the arbitration deputy shall insert the hearing date in the order to be signed by the Judge to whom the case is assigned. In the event one or more of the arbitrators selected are not available to hear the matter within the 30 day

period the arbitration deputy cleark shall select at random pursuant to the procedure set forth above such additional names as may be needed to constitute the arbitration panel.

VIII. REFERRING CASES TO ARBITRATION AND DESIGNATION OF ARBITRATORS

The case shall be referred to arbitration and the arbitrators selected shall be appointed in an order signed by the Judge to whom the case has been assigned. A form of order is attached as Exhibit D.

Section 4(b) of Local Civil Rule 49 provides that the parties may by agreement select any person or persons to conduct the arbitration but they shall be limited to three arbitrators who need not be lawyers. Arbitrators selected by agreement of the parties may be paid such compensation as the parties agree. However, arbitrators selected by the court shall not be paid any compensation other than that provided in the Rule. In the event the parties have not notified the Clerk of Court that they have made such a selection the Clerk of Court shall proceed with the random selection process for the selection of arbitrators heretofore described.

As soon as the Judge signs the order referring the case to arbitration the Clerk of Court shall immediately mail a copy of the said order to all counsel of record and the arbitrators. In addition, the arbitration deputy clerk shall immediately mail a copy of Notice to Arbitrators, Exhibit E. attached hereto, to the arbitrators together with the form of arbitration award, which is attached hereto as Exhibit F.

IX. NOTICE TO THE PARTIES

Immediately upon being notified that the court has signed the arbitration order the arbitration deputy clerk shall send out the notice notifying all parties of the time and place of the hearing. The form of notice is attached. (Exhibit G.) Notice of the hearing date must be given to the parties at least 15 days prior to the date set for the arbitration hearing.

X. PLACE OF ARBITRATION

All arbitration hearings shall be held in an United States District Court Courtroom. Courtrooms shall be made available for arbitration hearings in the United States Courthouse at Philadelphia, and at Reading and Allentown.

XI. AWARDS AND JUDGEMENT

The Chairman of the arbitration panel shall file the arbitration award with the court promptly after the hearing is concluded. The form of the award is attached. (Exhibit E.) The Clerk of the Court shall enter the judgment pursuant to the arbitration award after the elapse of a 20 day period following the filing of the award, unless a party has filed a demand for a trial de novo. A judgment entered by the Clerk pursuant to an arbitration award shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be appealable. In the event, however, that a trial de novo is demanded, the action shall proceed as though it had never been referred to arbitration.

XII. STATISTICS TO BE KEPT BY THE CLERK'S OFFICE

The following statistical data should be developed in order to evaluate the effectiveness of the Rule:

a. The number of cases otherwise eligible for arbitration in which a certification of damages in excess of $50,000 has been filed.

b. The number of cases referred to arbitrators.

c. The number of cases referred to arbitrators by agreement of parties.

d. A classification of the types of cases referred to arbitration.

e. The elapsed time from the filing of the complaint to the filing of the arbitration award.

f. The number of cases in which de novo appeals are filed.

g. The number of cases eligible for arbitrators which have not been sent to arbitrators because: (a) Discovery is not completed, or (b) Motions are pending, or (c) Any other reason.

Exhibit A

LOCAL DISTRICT COURT RULE—ARBITRATION

Section 1. Certification of arbitrators

a. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

b. An individual may be certified to serve as arbitrator if: (1) he has been for at least five years a member of the Bar of the highest court of a State or the District of Columbia, (2) he is admitted to practice before this court, and (3) he is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

c. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28, U.S.C. section 453 before serving as an arbitrator.

d. A list of all persons certified as arbitrators shall be maintained in the Office of the Clerk.

Section 2. Compensation and expenses of arbitrators

The chairman of the arbitration panel shall be compensated at seventy dollars for each case in which he serves as chairman; the other two arbitrators on the panel shall each receive forty dollars for each case in which they serve. In the event the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated seventy dollars for each case in which he serves as a single arbitrator. The fees shall be paid by or pursuant to the order of the District of the Administrative Office of the United States Courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

Section 3. Jurisdiction and powers of arbitrators

The court shall refer to arbitration any civil action in which the complaint was filed after February 1, 1978 provided:

1. The United States is a party, and:

(A) The action is of a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

(B) The action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. section 270(b)), the United States has no monetary interest in the claim, and the relief sought:

(i) Consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

(ii) Consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; or

2. The United States is not a party, and;

(A) The parties consent to arbitration and the relief sought consists only of money damages; or

(B) (i) The relief sought:

(a) Consists only of money damages not in excess of $50,000 exclusive of interest and costs; or

(b) Consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; and

(ii) Jurisdiction is based in whole or in part on:

(a) Title 28, U.S.C. section 1331 and the action is brought pursuant to section 20 of the Act of March 4, 1915, as amended (Title 46, U.S.C. sec. 688);

(b) Title 28, U.S.C. section 1331 or 1332 and the action is based on a negotiable instrument or a contract; or

(c) Title 28, U.S.C. section 1332 or 1333 and the action is for personal injury or property damage.

Section 4. Referral to arbitration

(a) (1) Actions subject to arbitration pursuant to this rule shall automatically be referred to arbitration by the judge to whom the case has been assigned (acting through the courtroom deputy clerk) as soon as possible after a twenty-day period from the filing of the answer. In the event that a third party is brought into the action, this twenty-day period shall commence to run from the date of the filing of an answer by the third party. In the event that a party has com-

menced discovery within the twenty-day period, and the court is so notified, the case shall not be referred to arbitration until discovery has been completed or upon expiration of one-hundred twenty days from the filing of the answer, whichever occurs earlier. In the event that a party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the case shall not be referred to arbitration until the court has ruled on the motion, but the filing of such a motion after referral shall not stay the arbitration unless the judge so orders.

(2) For the sole purpose of making the determination as to whether the damages are in excess of $50,000, exclusive of interest and costs, as provided in sections 3(1)(B)(i), 3(1)(B)(ii), 3(2)(B)(i)(a) and 3(2)(B)(i)(b), damages shall be presumed in all cases to be less than $50,000, exclusive of interest and costs, unless counsel of record for the plaintiff at the time of filing the complaint or counsel of record for defendant at the time of filing an answer containing a counterclaim, files with the court a document signed by said counsel which certifies to the best of his knowledge and belief that the damages recoverable exceed the sum of $50,000, exclusive of interest and costs. The court may disregard such certification and require arbitration if satisfied that recoverable damages do not exceed $50,000.

(b) The arbitration shall be conducted before a panel of three arbitrators, one of whom shall be designated as chairman of the panel, unless the parties agree to have it conducted by a single arbitrator. The parties may by agreement select any person or persons to conduct the arbitration. If, within seven days after the action has been referred to arbitration, the parties have not notified the Clerk of the Court that they have made such a selection, the arbitrator or arbitrators shall be chosen by the Clerk by a process of random selection from among the persons certified as arbitrators by the court.

(c) A person selected to be an arbitrator shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. section 144 and shall disqualify himself in any action in which he would be required under Title 28, U.S.C. section 455 to disqualify himself if he were a justice, judge, magistrate or referree in bankruptcy.

Section 5. Arbitration hearing

(a) The arbitration hearing shall commence not later than thirty days after the action is referred to arbitration and shall be concluded promptly.

(b) The chairman of the arbitration panel shall set the time, date and place of hearing, and shall give notice of the hearing date to the parties at least fifteen days prior to the date set for the arbitration hearing.

(c) The arbitration may proceed in the absence of any party who, after due notice, fails to be present, but an award of damages shall not be based solely upon the absence of a party.

(d) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter. Testimony at an arbitration hearing shall be under oath or affirmation.

(e) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence in an arbitration hearing, but strict adherence is not required. Relevance and efficiency shall be the primary considerations.

(f) A party may have a recording and transcript made of the arbitration hearing at his expense. If a party has a transcript or a tape recording made, he shall furnish a copy of the transcript or tape recording without charge to any other party, unless the parties otherwise agree.

Section 6. Arbitration award and judgment

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial de novo pursuant to Section 7 has expired, unless a party demands a trial de novo before the court pursuant to that section. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

Section 7. Trial de novo

(a) Within twenty days after the filing of the arbitration award with the court, any party may demand a trial de novo in the district court.

(b) Upon a demand for a trial de novo, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial de novo the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial de novo.

(d) If the party who demanded a trial de novo fails to obtain a judgment in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the amount of the arbitration fees and, if he is a defendant, he shall pay to the plaintiff interest on the arbitration award from the time it was filed, at the current legal rate of interest.

U.S. Department of Justice,
Office of the Associate Attorney General,
Washington, D.C., February 2, 1978.

Hon. Joseph S. Lord III
Chief Judge, U.S. District Court,
Philadelphia, Pa.

Dear Judge Lord: This is to state that the Department of Justice agrees to the submission to arbitration (under local court rule in the Eastern District of Pennsylvania for the one-year arbitration experiment that began February 1, 1978) of the following types of cases in which the United States is a party, only money damages are sought, and the damages sought do not exceed $50,000: Actions brought under the Federal Tort Claims Act (28 U.S.C. 1346(b); 2671, et seq.); actions brought under the Longshoreman's and Harbor Workers' Compensation Act (33 U.S.C. 905).

We are continuing to examine the types of civil actions in which we are a party in order to determine whether additional matters may be suitable for arbitration.

Sincerely,

Michael J. Egan,
Associate Attorney General.

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Designation Form to be used by counsel to indicate the category of the cause for purpose of assignment to appropriate calendar

Address of Plaintiff: ______________________

Post Office: ______________ County: __________

Address of Defendant: ______________________

Post Office: ______________ County: __________

Place of accident, incident or transaction: ______________

Post Office: ______________ County: __________

(use reverse side for additional space)

RELATED CASE IF ANY

Case Number ________ Judge ________ Date Terminated ____

CIVIL cases deemed related when:

1. ( ) Related to property included in an earlier number suit pending or within one year previously terminated action in this Court.
2. ( ) Involve the same issue of fact or grew out of the same transaction as a prior suit pending or within one year previously terminated action in this Court.
3. ( ) Involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this Court.
4. ( ) Does this action involve Multi-District Litigation possibilities?

BANKRUPTCY cases deemed related when:

1. ( ) Husband and wife.
2. ( ) Involve property included in earlier numbered bankruptcy suit.

CRIMINAL cases deemed related when:

1. ( ) Involve the same criminal transaction related to any other pending or within one year previously terminated action in this Court.

CIVIL (Place (X) in (ONE CATEGORY ONLY)

A. Federal Question Cases:

1. ( ) Habeas Corpus
2. ( ) Civil Rights
3. ( ) Federal Employees Liability Act
4. ( ) Indemnity Contract, Marine contract, and all other contract cases
5. ( ) Labor Management Relations Act
6. ( ) Jones Act - Personal Injury
7. ( ) Anti-trust
8. ( ) Patent
9. ( ) All Other Federal Question cases (Please specify)

B. Diversity Jurisdiction Cases:

1. ( ) Marine Personal Injury
2. ( ) Motor Vehicle Personal Injury
3. ( ) Airplane Personal Injury
4. ( ) Other Personal Injury (Please specify)
5. ( ) Insurance Contract and other contracts
6. ( ) Assault, Defamation
7. ( ) All other diversity cases (Please specify)

ARBITRATION CERTIFICATION

I, ____________________, counsel of record do hereby certify pursuant to Local Civil Rule 49, Section 4(a)(2), that to the best of my knowledge and belief the damages recoverable in this civil action case exceed the sum of $50,000.00 exclusive of interest and costs.

DATE: __________ ______________ ATTORNEY-AT-LAW

CRIMINAL: (Criminal Category - FOR USE BY U.S. ATTORNEY ONLY)

1. ( ) Mail Fraud
2. ( ) Income Tax and other tax prosecutions
3. ( ) Anti-trust
4. ( ) Bank Robbery
5. ( ) General Criminal

(U.S. ATTORNEY WILL PLEASE DESIGNATE PARTICULAR CRIME AND STATUTE CHARGED TO BE VIOLATED) ______________________

BANKRUPTCY: (PLACE (X) IN CATEGORY WHICH INDICATES CHAPTER OF BANKRUPTCY APPLICABLE)

1. ( ) Chapter X
2. ( ) Chapter XI
3. ( ) Chapter XII and Involuntary
4. ( ) All others (includes Chapters I to IX and XIII. Also certificate for Review and Ancillary Proceedings.

I certify that to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this Court except as noted above.

DATE: __________ ______________ ATTORNEY-AT-LAW

EXHIBIT C

In the United States District Court for the Eastern District of Pennsylvania

In re—

CERTIFICATION OF ARBITRATORS PURSUANT TO LOCAL CIVIL RULE 49

ORDER

AND NOW, this day of , 1978, it appearing to the court that the attorneys named on the attached list are eligible for certification as arbitrators, it is,

HEREBY ORDERED, pursuant to Local Civil Rule 49, Section I(a), that the members of the Bar named on the attached list are certified as persons competent to perform the duties of arbitrator and shall take the oath or affirmation prescribed by Title 28, United States Code, Section 453, before serving as an arbitrator in any case.

By the Court:

_____ _____,
Chief Judge.

Chairman. _____ _____.
Arbitrator. _____ _____.
Arbitrator. _____ _____.

EXHIBIT D

In the United States District Court for the Eastern District of Pennsylvania

CIVIL ACTION NO.__

ORDER REFERRING CASE TO ARBITRATION AND APPOINTING ARBITRATORS

AND NOW, this day of , 1978, it is hereby

ORDERED, pursuant to Local Civil Rule 49, Section 4(a)(1) that the above designated civil action is referred to arbitration and the below named arbitrators:

Chairman. _____ _____.
Arbitrator. _____ _____.
Arbitrator. _____ _____.

having been selected at random by the arbitration clerk from among those certified as arbitrators and shall hear this case at_____, _____, _____
(Time) (Date) (Place)
_____, pursuant to a notice which shall this day be mailed by the arbitration clerk to all counsel of record and the arbitrators, it is

FURTHER ORDERED, that the above designated chairman shall file with the Clerk of this Court, the arbitration award after the hearing is concluded.

By the Court:

_____ _____,
Judge.

EXHIBIT E

TO ARBITRATORS APPOINTED UNDER LOCAL CIVIL RULE 49

You have been appointed to serve as an Arbitrator pursuant to the provisions of Local Civil Rule 49. The appointment is a personal one and shall remain in effect until the termination of the arbitration proceeding.

You should also note the following points regarding the arbitration process:

1. The Federal Rules of Evidence shall apply to the arbitration hearing, but strict adherence is not required. Relevance and efficiency shall be the primary considerations.

2. The arbitration panel shall have the power to issue subpoenas for the attendance of witnesses and the production of documentary evidence in accord with Rule 45 of the Federal Rules of Civil Procedure.

3. The arbitration hearing may proceed in the absence of any party who, after due notice, fails to appear, but an award shall not be based solely upon the absence of any party.

4. A party may transcribe or record the proceeding at his own expense. Such a recording or transcript must be furnished to any other party, unless the parties otherwise agree.

5. The arbitration panel shall utilize the Form of Award adopted by the court.

Maximum compensation for arbitrators

	Per case
1. Chairman	$70
2. Panel member	40

(NOTE.—Arbitrators shall not be reimbursed for actual expenses incurred in the performance of their duties.)

EXHIBIT F

In the United States District Court for the Eastern District of Pennsylvania

CIVIL ACTION NO. —

ARBITRATION AWARD PURSUANT TO LOCAL CIVIL RULE 49

AND NOW, this day of , 1978, we, the undersigned arbitrators having been duly certified and sworn and having heard the above-captioned civil action on , 1978, do hereby make the following award pursuant to Local Civil Rule 49.

Chairman. _____ _____.
Arbitrator. _____ _____.
Arbitrator. _____ _____.

NOTICE

This award will become a final judgment of the court, without the right of appeal, unless a party files with the Court a demand for a trial de novo within twenty days after the filing of the arbitration award.

EXHIBIT G

In the United States District Court for the Eastern District of Pennsylvania

CIVIL ACTION NO. —

NOTICE OF ARBITRATION HEARING

Please take note that the above-captioned civil action case has been scheduled for arbitration at on , 1978, in Courtroom of this United States Courthouse, 6th and Market Streets, Philadelphia, Pennsylvania 19106.

Chairman. _____ _____.
Arbitrator. _____ _____.
Arbitrator. _____ _____.
Deputy Clerk for Arbitration. _____ _____.

Date:

○